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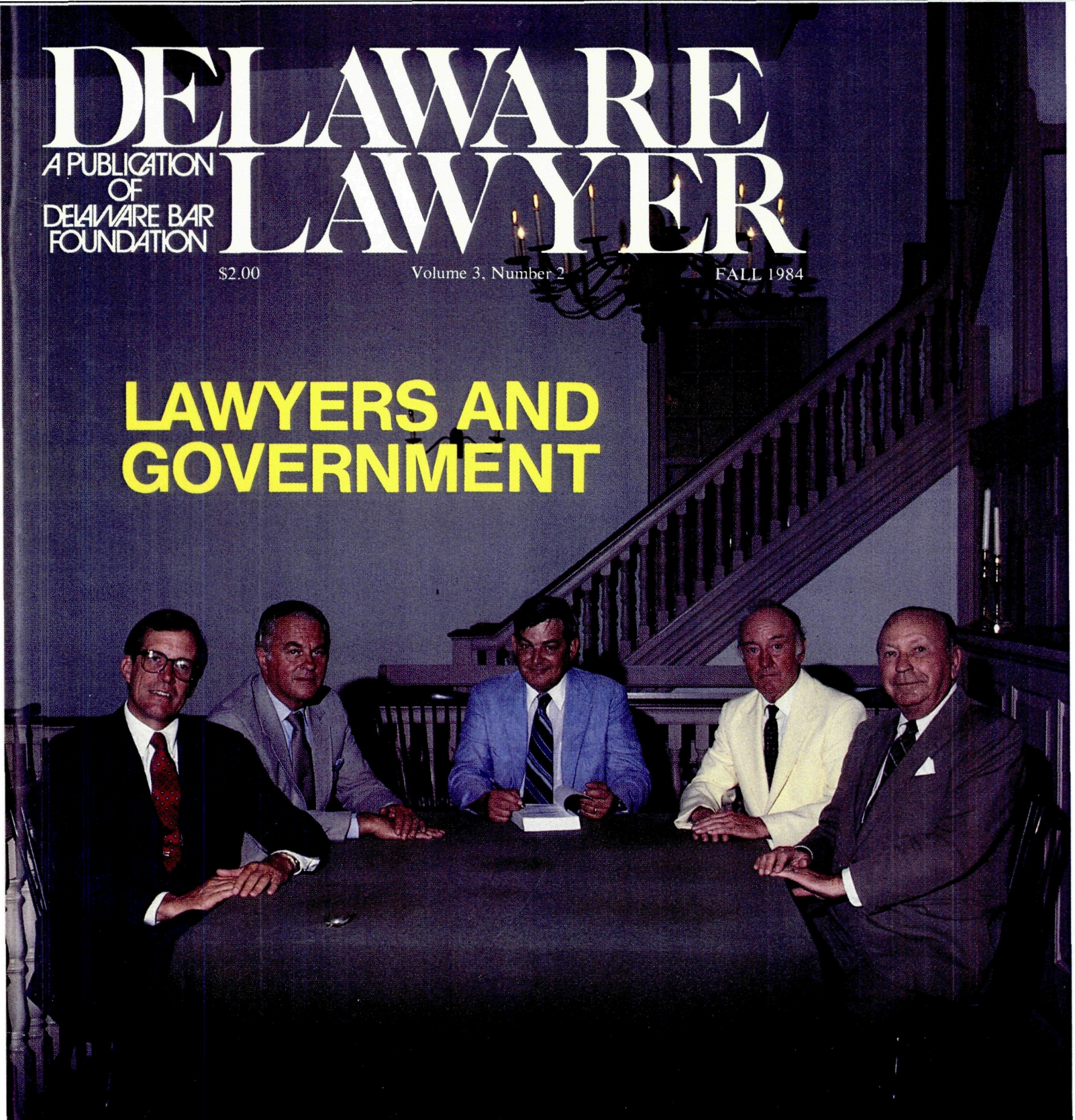

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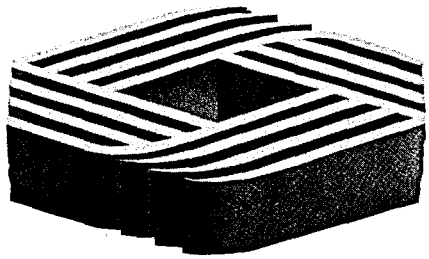

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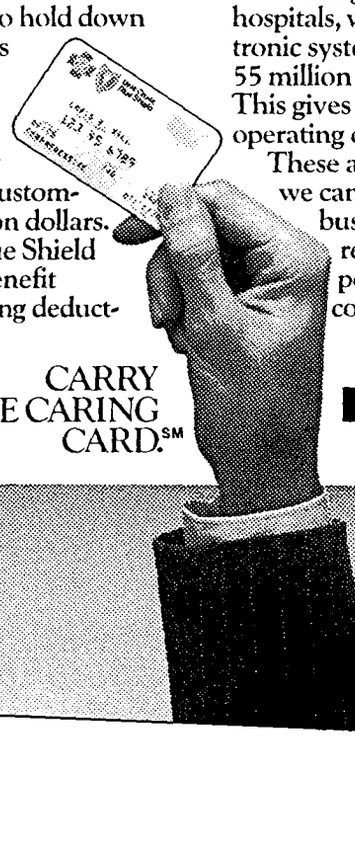

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VOL. 3 NO. 2
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Contents

4	EDITOR'S COLUMN	*The Editors*
4	*Advertiser Index*	
6	REFLECTIONS OF A DELAWARE STATESMAN	*Elbert N. Carvel*
12	DO LAWYERS HELP OR HINDER PUBLIC POLICY-MAKING?	*William V. Roth, Jr.*
20	"NOW THE FIRST THING WE DO . . ."	*Michael N. Castle*
21	THE DUTY AND PRIVILEGE OF SERVING	*William T. Quillen*
29	LAWYERS WANTED: NO EXPERIENCE REQUIRED	*Orlando J. George, Jr.*
34	A LAWYER-LEGISLATOR ASSAYS HIS ROLE	*Harry K. F. Terry*
40	POLITICAL RESPONSIBILITY — A LAWYER'S OBLIGATION	*Joseph R. Biden, Jr.*
46	DISINTERESTED OR JUST INDIFFERENT?	*John M. Burris*
48	THE NEW LAWYER-POLITICIANS	*Joseph Weik*
52	NO WINDOWS AND NO HEAVY LIFTING	*H. Murray Sawyer, Jr.*
56	DELAWARE'S FIRST LAWYER-GOVERNOR THOMAS MCKEAN	*Roger A. Martin*
58	THE NEW DUI LAW: ITS VIOLATION OF YOUR RIGHTS WILL DRIVE YOU TO DRINK	*Louis B. Ferrara*
60	BOOK REVIEW	*Richard C. Kiger*

Our Cover:

On Wednesday, July 18, Senator Roger A. Martin of Newark, a legislator, teacher, and accomplished historian, assembled the Governor of Delaware and three former Governors in the Old Court House in New Castle for a book-signing ceremony. The book: **A History of Delaware Through Its Governors 1776-1984**, *an excerpt from which appears in this issue. The administrations of the four gentlemen seated with Senator Martin are described in that book. Seen from left to right: Governor Pierre S. duPont, IV; former Governor Sherman W. Tribbett; Senator Martin; Family Court Judge and former Governor David P. Buckson; and former Governor J. Caleb Boggs.*

DELAWARE LAWYER is published by Delaware Bar Foundation as part of its commitment to publish and distribute addresses, reports, treatises and other literary works on legal subjects of general interest to Delaware judges, lawyers and the community at large. As it is one of the objectives of DELAWARE LAWYER to be a forum for the free expression and interchange of ideas, the opinions and positions stated in signed material are those of the authors and not, by the fact of publication, necessarily those of Delaware Bar Foundation or DELAWARE LAWYER. All manuscripts are carefully considered by the Board of Editors. Material accepted for publication becomes the property of Delaware Bar Foundation. Contributing authors are requested and expected to disclose any financial, economic or professional interests or affiliations that may have influenced positions taken or advocated in the articles. That they have done so is an implied representation by each author.

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ADVERTISER INDEX

Volume 3, Number 2 Fall, 1984

Airport Porche Audi, Inc. 51
Bank of Delaware 39
Berger Bros, Inc. 25
Blue Cross Blue Shield of Delaware 1
City Systems, Inc. 17
Corporation Service Co. 10
CPC Services, Inc. 17
Crossan Studios 24
Delaware Cadillac 3
Delaware Travel 24
Delaware Trust Co. 15
Delmarva Limited 11
Dewberry Engraving Co. 44
Dictograph Security 4
General Business Services 23
Gilpin Allegheny Realty Co. . . . . 30&31
Globe Litho, Inc. 50
Goldsborough Company Realtors 49
Greytak Chevrolet 14
Harvard Business Services, Inc. . . . 55
Holiday Coffee Service 42
Kreston Liquor Mart 26
Lazy Lawyer Co. 18
Leon's Inc. 38
The Medical Center of Delaware 50
Med-Law Consultant Group 45
Professional Liability Insurance Co. . . . . 3rd Cover
Edward H. Richardson Associates, Inc. 35
Royal Imports 5
B. Gary Scott, Realtors 23
The Shaving Mug 42
Smith Volkswagen 28
Stonegates 27
Stoney Batter Condominiums 16
Terry Strine 54
Take-A-Break, Inc. 49
Thornapple Ltd. 17
Union Park Pontiac 37
West Publishing Co. . . . . 4th Cover
Charles Weymouth Architects 36
Wilmington Trust . . 2nd Cover, 9&33
Winner Leasing 19
Wright & Simon 8

EDITOR'S COLUMN

Of the ten major party candidates for statewide office in this year's general election, six are lawyers. This statistic points up the expanding participation and visibility of lawyers in the political process. Whether as candidates for office, counselors to office holders, or constitutional and statutory draftsmen, lawyers exercise a wholesome influence on our democratic system. For sure, we continue to be a court oriented profession. In this issue, however, we offer to our readers an engaging selection of observations by and about lawyers who have entered the world of politics at various levels. Enlivened by the insights of lawyers who are legislators, and would-be governors, we believe this issue will deepen appreciation of the contributions made by members of our profession in a different forum. As always, we hope to provoke thoughtful debate over the role of lawyers in the process of organizing, harnessing, and constraining political power, a role received in the form of a public trust.

In dealing with our advertisers, please tell them you saw their notices in these pages. They make your magazine possible.

The Editors.

REFLECTIONS OF A DELAWARE STATESMAN

A LONG VIEW OF THE PROFESSION IN PUBLIC LIFE

ELBERT N. CARVEL

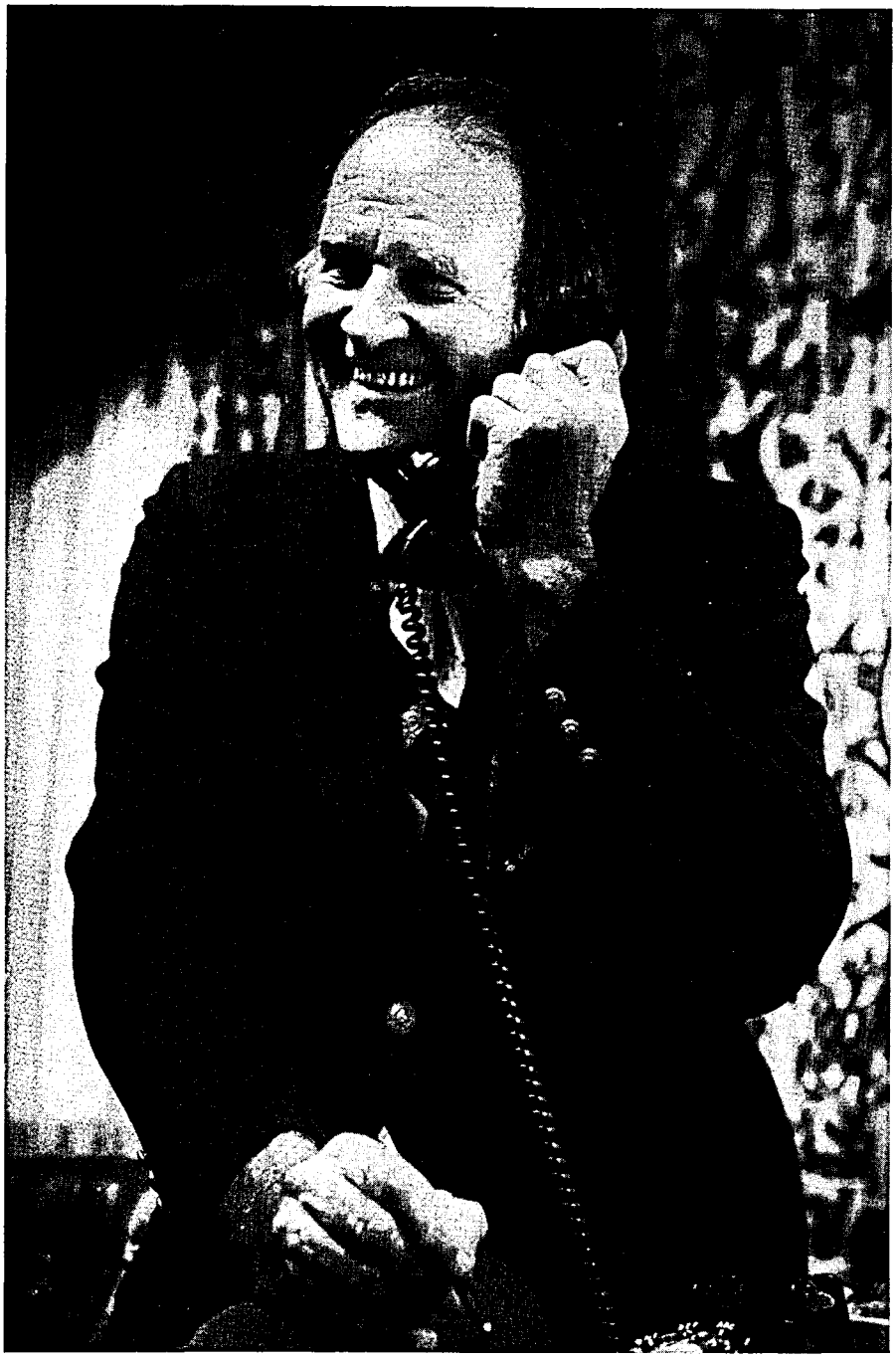
Someone has said that there are no living statesmen. When one realizes how the founders of our nation were castigated, criticized, and defiled in their times and then observes them as statesmen today, one begins to understand how time and distance lend enchantment to those willing to take an up-popular stand.

My first term as Governor coincided with President Harry Truman's second term. I find in Truman's historical reputation confirmation of the above. President Truman approached his responsibilities as our chief executive with a simple, uncomplicated, unvarnished philosophy: do what you believe is right, no matter how controversial, and history will confirm your stand! At the end of his second term he was one of the most unpopular Presidents in our history. The Korean War, the recall of General McArthur as the Commander of the Korean Operation, his stand on desegregation, his containment of the U.S.S.R., his efforts to rehabilitate Europe and Japan following World War II, and many other acts contributed to that unpopularity. He could displease even his supporters, as when he cracked down on John L. Lewis and the United Mine Workers when he believed they were acting improperly. Today he is rated as one of our great Presidents, just 31 years following the end of his term.

When I first studied history in the public schools of Maryland, I began to understand that the founding leaders of our nation, later regarded as statesmen, had followed a sometimes uncharted course of breaking new ground under the most difficult conditions. Their examples were highly inspirational to a lad of 10 years and I decided then and there that my future lay in public affairs. I believed that I should try to be elected to the U. S. Senate and serve my country as had such statesmen as Washington, Adams, Franklin, Marshall, Jefferson, Hamilton, Lincoln and Jackson. I also learned early to respect lawyers for their necessary contribution to progress.

My grandfather, Peter Elbert Nostrand, was an eminent civil engineer in New York City at the turn of this century. During his experience in constructing large municipal enterprises he participated in numerous condemnation

Former Governor Carvel, though not a member of the Bar, holds a degree from the University of Baltimore Law School. His training in law served him — and Delaware — well in his advocacy of judicial excellence and in the reconstitution of the Supreme Court. He has been a member of the Judicial Nominating Commission and Chairman of the Delaware Constitutional Revision Commission. In 1980 Chief Justice Herrmann named him to the Committee on the Judiciary. The legal profession has honored Governor Carvel, a devoted friend, in 1982 with the Delaware State Bar Association Liberty Bell Award, and this year with the Herbert Harley Award of the American Judicature Society.



suits to pave the way for the erection of the Ramapo Dam near Kingston, New York. Without the help of legal counsel he successfully concluded these condemnation suits single-handed and, during the latter part of his life, regretted that he had not become an attorney-at-law instead of a civil engineer.

My grandfather's encouragement led me to take up law studies at the University of Baltimore in the fall of 1928. Not forgetting my early desire for public service, I felt that the study of the law was the logical path to this goal.

During early indoctrination one of my professors urged the class to read the "Life of John Marshall" by Albert J. Beveridge, the former U. S. Senator for Indiana. It was not until 1933 that I obtained the first of Beveridge's four volumes from the Enoch Pratt Free Library in Baltimore. It proved so fascinating that I proceeded to read the entire work, which demonstrated how John Marshall, through his constitutional decisions, had succeeded in providing the glue that welded together the separate and independent colonies into one great United States. The biography of Marshall demonstrated how his wise decisions in *Marbury vs. Madison*, *McCulloch vs. Maryland* and *Cohens vs. Virginia*, established the Federal Government as the supreme power of the land. In *McCulloch vs. Maryland* he said, "This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them."

I graduated from the University of Baltimore Law School June 1931 during the rock bottom of the great depression. At that time I was earning $25.00 a week as chief clerk in the New Business Department of the Baltimore Gas and Electric Company. (My law school studies took up two to three hours a night, five nights a week for three years.) I had many friends who were working in law offices as law clerks for $5.00 a week. Obviously, law held out for a young man who was planning to get married scant opportunities for immediate riches. Furthermore, my goal was not the practice of law, but service in public life.

When my wife and I came to Delaware in May of 1936, I was made office manager of Valliant Fertilizer Company. In October of that year, I became General Manager and Treasurer of the Company. It was then that my background in the law started to be helpful. The depression had resulted in serious devaluation of farm land and farm prices with a resultant depressing effect on companies serving farmers.

Frank M. Jones, Esquire, of Georgetown, Delaware, a brother-in-law of Robert H. Richards of Wilmington, was counsel to our company and a warm personal friend of William E. Valliant, the founder.

In the process of collecting the many accounts and notes that had

accumulated during the depression years I had the opportunity of discussing many subjects with Mr. Jones, an extremely wise and gentle person, and we formed a warm friendship. In the course of our conversations I informed him of my interest in public affairs and in the Democratic Party.

There was one lawyer in our State whom I had appointed to the Superior Court during my first term and subsequently resigned from the bench. All during my second term, his advice and counsel given unstintingly were invaluable. He is now Chief Justice.

He was most helpful with his advice about Delaware history and politics. We discussed President Franklin Roosevelt and the prospect of his third term, election laws in Delaware, participation in public affairs, and the Judiciary and John Marshall. Later, in 1945, after I became the Lieutenant Governor of Delaware, he recommended that I be named a member of the Board of Trustees of the University of Delaware. Warren C. Newton, of Bridgeville, whom I met frequently in business, also gave a helpful recommendation. I had not sought this office and my nomination came as a complete, although most pleasant, surprise.

In the spring of 1940 my company wanted to collect a small bill for about $300.00 from a farmer in the neighborhood of Newark, Delaware. The farmer's debt was over one year past due and he would not give a note to settle his account. A title search showed that all real property was in his wife's name. We decided to attach his crops and obtain a judgment. Because we had no attorney in New Castle County, I asked Mr. Jones to recommend one. He suggested Richards, Layton & Finger, and told me to call upon Mr. Robert H. Richards. I was flabbergasted. Mr. Jones was sending me to call upon the illustrious Robert H. Richards, head of the most prestigious law firm in Delaware, about an insignificant fertilizer bill! Mr. Jones reassured me: "It will be all right. He will take care of it."

I marched up to the offices of Richards, Layton & Finger on the fourth floor of the duPont Building, asked the receptionist to announce me to Mr. Richards, and within five minutes I was ushered into his office. I informed him that Mr. Jones had recommended his firm and that I wished to obtain a crop lien and judgment for $300.00 against a farmer. He received me courteously and gravely. We exchanged a few pleasantries about Sussex County and Mr. Jones. He then called in a young lawyer named Henry Canby and asked him to handle our case.

Canby went over the case very thoroughly with me, examining the delivery tickets (duly signed by the farmer) and the statement of the account that I had brought with me. We then proceeded to the farm, interviewed the farmer, and observed the crop. Canby proceeded to obtain the lien and judgment. Because we had the judgment we were later able to repossess a fairly new pickup truck, which was in the farmer's name, with only a small balance owed to a finance company. We paid off the finance company and recovered the full amount of our bill without the necessity of attempting to recover on an uncertain crop lien.

A Delaware law firm representing the biggest corporations in the United States did not fail to serve a small Sussex County corporation attempting to collect a bill that I considered insignificant. I had already had a high opinion of the Bar. This experience reinforced it mightily.

We had customers all over Delaware. In addition to my managerial responsibilities, I handled the selling and dealt with the agents for New Castle and Kent Counties. Often, on my journeys up-state, I would drop by for lunch at the Duval Tea House, next to the State Theatre on South State Street in Dover.

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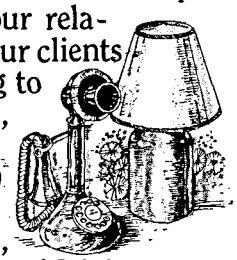

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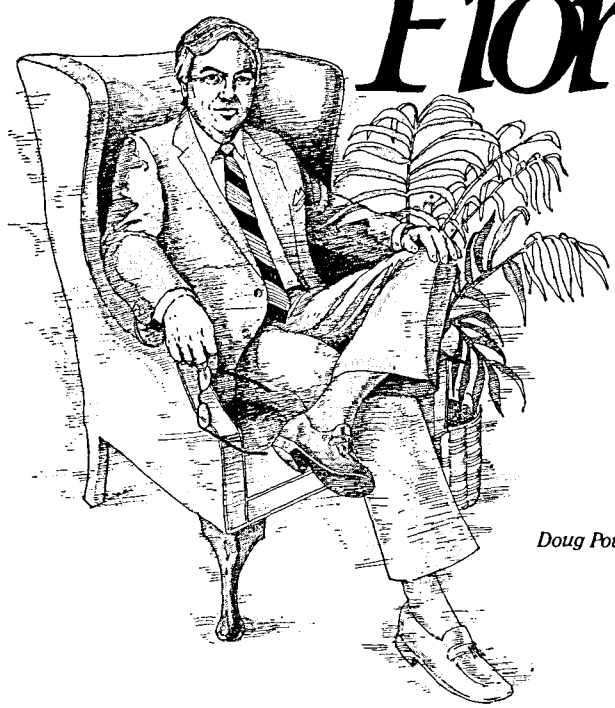

Doug Poulter, President

Usually there would be assembled in the rear of the dining room such members of the bar as Bill Storey, Secretary of State, Charles L. Terry, Doc Harmonson, and George Fisher. At the invitation of Doc Harmonson, I often joined this convivial and bipartisan group. I have fond memories of the pleasantries and barbed exchanges which often took place. Since the food was superb, it came to be the gathering place for the leaders of Kent County. Governor McMullen often lunched there.

During my service on the Board of Trustees of the University, I came under the wing of Judge Hugh M. Morris, the Chairman of the Board, who was an outstanding example of the high caliber of those who were members of the Delaware Bar. He toiled long and hard on behalf of the University and it was through his leadership that the University achieved the enviable position of reaching one of the highest endowments of any State University in the country. Judge Morris, a son of Sussex County, was a man of high ideals and unquestioned principle. He was an inspiration to all with whom he was associated.

Judge Richard S. Rodney was also a member of the Board of Trustees of the University of Delaware. I knew him from this association as well as through his activity in the Episcopal Church. His fine sense of humor made it a delight to be in his company. Following the meetings of the University of Delaware Board, Judge Rodney, Charles Grubb, Dean J. Fenton Daugherty and I would retire to one of the rooms of Old College where there was a billiard table and we would engage in a few hours of bottle billiards.

In 1945, Governor Walter Bacon nominated Daniel J. Layton to succeed himself as Chief Justice of the Supreme Court of Delaware. At that time, I was the Lieutenant Governor of Delaware and as such was the President of the Delaware Senate. There was great controversy over this reappointment within the Senate, especially among the down-state members.

The Governor sent Layton's name down to the Senate for confirmation three times and the Senate rejected the name three times, Layton only receiving a maximum of eight votes out of seventeen. When the name was before the Senate for the third time on a hot July evening, a packed audience was gathered in the Delaware Senate where an open hearing was being conducted. The Honorable Robert Houston of Georgetown and the Honorable Hugh M. Morris of Wilmington both made impassioned speeches urging that confirmation be denied on the grounds that the Chief Justice refused to excuse himself from hearing cases where close relatives such as his sons or nephews were representing clients who appeared before him. I felt that a reasonable case was made by the two men, but I always regretted that there was never anyone who spoke up on behalf of the Chief Justice. It seemed to me that in the interest of simple justice, someone should have presented Chief Justice Layton's case before the Senate.

During both of my terms as Governor, occasionally I would be approached by friends, party people or just citizens of the state with no connections, asking me to intervene in a case before a Judge, or a Justice of the Peace. Apparently that idea went back to the time when the sovereign was the Court and all cases came before him.

I would always patiently explain that of course such intervention was not only impossible but highly improper. I would point out that a Judge should be entirely impartial and that if someone could intervene on his behalf, then someone could intervene against him as well and that the ends of justice would be defeated.

During my first term as Governor I made several snap decisions which were unwise and which I strongly regretted later. I came to the conclusion that it was important to call upon wise heads throughout the State when knotty and controversial problems arose. For this purpose I gathered together several groups. One was the ad hoc Goals Commission, which I created by Executive Order. I called upon the best brains in the State to assist me in developing programs and goals which would best serve the future of the people of Delaware.

The other group was an informal small committee which we called the Kitchen Cabinet. It consisted of several distinguished lawyers and close associates in the administration. We addressed such knotty issues as Public Accommodations Legislation, including national concerns over accommodations for travelling diplomats. At that time, facilities in Delaware were segregated, and improper handling by the many business services catering to the public could cause an international incident.

Another deep concern was how to lead the people of our state to support rehabilitation instead of punishment, retaliation, and the death penalty. Herbert Cobin, Esquire, and others aided me in delineating the posture which I took in this difficult area. I cannot let the opportunity pass without commenting on the effect that the Delaware clergy had in helping the people of Delaware realize the importance of passing a Public Accommodations Law in

our State.

When I ran for Governor in 1948, I was fortunate to have Alexis I. duPont Bayard as my running mate. Lex is the scion of a family whose members have variously distinguished themselves by serving in the Congress, in the President's Cabinet, and in the diplomatic service as Ambassador to the Court of St. James. When he ran with me he was a young lawyer of thirty-one who had served with the Marines in the South Pacific during World War II. He was most helpful in getting our program enacted in the General Assembly. His greatest achievement was the leadership he provided in obtaining the enactment of the Constitutional Amendment authorizing a separate Supreme Court of Delaware in 1951. This made it incumbent upon me to appoint a new Supreme Court. If I appointed the new court without promoting from the Superior Court, or the Court of Chancery, I had to appoint two Democrats and one Republican. James M. Tunnell, Jr., Esquire, of Georgetown, and Chancellor Daniel F. Wolcott had each advised me of his willingness to serve as Chief Justice. This was a real dilemma. Both were highly qualified lawyers of great integrity, wisdom, and ability and I felt that we needed both on the Court.

One evening, I was talking with E. Ennalls Berl, Esquire, who suggested that Clarence A. Southerland, Esquire, a former Attorney General of Delaware who at that time was 62 years of age, was willing to sacrifice his highly lucrative practice and serve as Chief Justice. Southerland was well known for outstanding ability. I felt that there could be no finer Supreme Court in the United States than one composed of Southerland as Chief Justice and Tunnell and Wolcott as Associates.

I called Mr. Southerland, invited him to luncheon in the Green Room of the Hotel duPont, told him how much I admired his qualifications, and stated that it would give me tremendous satisfaction to have him serve on the new Supreme Court as Chief Justice. I realized that if he accepted he would be making a large financial sacrifice, but his service on the Court together with Tunnell and Wolcott would give Delaware the finest Supreme Court in the country.

Mr. Southerland paused for a few minutes in deep thought, and then, in a carefully measured response, told me that he was flattered by the offer and would like very much to talk it over with Mrs. Southerland and his family. Several days later he called me and gave the good news. He would be happy to serve and he looked forward to the opportunities that lay ahead.

As soon as I received his acceptance, I approached Jim Tunnell and Dan Wolcott. They were both willing and happy to serve with Southerland. The new court was endorsed by the populace, the bench, the bar and the State Senate. It lived up to expectations in every way and became one of the proudest achievements of my administration.

Some of my partisan Democratic friends were deeply disturbed that I had appointed Southerland, a Republican, as Chief Justice. That didn't matter to me at all. I pointed out to them that we now had the finest Supreme Court in the United States and that alone overrode all political considerations.

There was one lawyer in our State whom I had appointed to the Superior Court during my first term who had subsequently resigned from the bench. All during my second term, his advice and counsel given unstintingly were invaluable. He served as Chairman of the Planning Commission and as a member of the Goals Commission. He is now Chief Justice. Daniel L. Herrmann was my good friend and counsellor and I am deeply grateful for the many contributions he made to the success of my administrations.

After 48 years of close association with the bench and bar of the State of Delaware, I still hold them in the same high esteem with which I was impressed when I was a new resident of our State in 1936.

Delaware can be proud of the manner in which this great group conducts itself. Their integrity, dedication to the public welfare, their wisdom and fairness all contribute to making Delaware the Great State we enjoy today. □

DO LAWYERS HELP OR HINDER PUBLIC POLICY-MAKING?

WILLIAM V. ROTH, JR.

William V. Roth, Jr., our Senior United States Senator, has served continuously in the Congress of the United States since 1967. Today he is a Delaware institution en route to becoming a national one, very possibly the most respected Delawarean in public service since the retirement of his immediate predecessor in the Senate, the legendary John Williams. Roth's battles for sensible taxation and the curtailment of waste and mismanagement in government, especially in the Department of Defense, display him up front and on top of what will probably be the central issues of government for the balance of this century.

As a public official who also happens to be a lawyer, I must confess to a certain uneasiness every time I hear about a situation in which the decisions of elected officials, be they Members of Congress, state legislators or local city councils, are frustrated by our legal system. In our litigious society, where the phrase "Let's sue the bum" ranks right up there with "Kill the umpire," it sometimes seems that every citizen, group or special interest with an axe to grind is looking to the courts to second-guess public policy decisions with which they happen to disagree.

Often, of course, their cause is just; public officials make mistakes just like private citizens, and the courts may be the last recourse for those who lack the clout, financial or otherwise, to prevail in the political arena. But our system of government was not designed to settle every public policy dispute in court; and unless

we can find ways to resolve these conflicts short of a protracted legal battle, I am concerned that government at all levels may find itself increasingly unable to function efficiently in the service of the broad public interest.

One of the clearest examples in Delaware of this kind of "paralysis by litigation" was the Wilmington Medical Center's efforts to build a new hospital in Stanton, a Wilmington suburb. "Plan Omega," as the project is called, was unveiled in 1975 at a projected construction cost of about $61 million. Almost immediately the plan was challenged on civil rights grounds by a coalition of community groups representing the poor, the handicapped, the elderly and other minorities. The coalition, Wilmington United Neighborhoods, charged among other things that the plan would deny members of the groups it represented equal access to medical care and would adversely affect the quality of health care at the Medical Center's Delaware Division in downtown Wilmington.

The questions raised by Plan Omega's opponents were significant and legitimate; the Medical Center had an obligation to respond to them, and in fact, in a supplemental agreement negotiated by the U.S. Department of Health, Education and Welfare, the center reaffirmed its original commitment to take several steps to avoid discrimination. For example the center said it would maintain a free 24-hour shuttle bus service for patients, visitors and workers between Wilmington and the new hospital. Despite these commitments, however, the public-interest attorneys representing Wilmington United Neighborhoods decided to press their lawsuit, and the case dragged through the courts for five years before the Third Circuit Court of Appeals finally ruled against the plaintiffs and allowed Plan Omega to proceed.[1] During that time, construction costs of the new hospital nearly doubled, to more than $108 million, while interest rates were increasing from less than 7 percent to more than 10 percent, further inflating the cost of financing the project. Even now, as the hospital prepares to open, there is concern that its high cost will make health care even more of a financial hardship than it already is — not only for the poor, but for the middle-income users of the medical center as well.

I find several aspects of this dispute extremely troubling. Why did it take five years, nearly a dozen court rulings, and who knows how much money in court costs and legal fees to resolve

this conflict? While representatives of the minority groups and the hospital center fought for the interests of their clients in court, who was watching out for the interests of the average citizen, who will end up paying higher prices for his medical care because of the extended litigation? And finally, in seeking to protect the rights of the poor and other minorities, did the project's opponents actually do their clients a disservice by helping push health care costs beyond their reach?

I could cite dozens of other examples of public and private projects which have been delayed or cancelled as a result of legal battles lasting years, if not decades. Such delays, expecially when they affect construction of new industrial plants and similar facilities, not only cause inconvenience and higher prices for consumers, but they also can hamper the modernization and productivity of our industrial base. This contributes to our nation's problems in competing effectively in the world marketplace at a time when the nations of the Pacific Basin and Western Europe are increasingly challenging us in international trade.

While I do not agree with those who try to blame all of our problems on "too many laws, too many lawsuits, and too many lawyers," it is interesting to note that the number of lawyers in the United States has more than doubled since 1960 and now totals more than 612,000 — giving this country the largest bar and the most lawyers per capita in the world.[2] And yet, as an Ad Hoc Panel on Dispute Resolution and Public Policy pointed out in a recent report to the U.S. Department of Justice:

"...it has been estimated that 1 percent of the U.S. population receives 95 percent of the legal services provided... Not only is the largest segment of our population precluded from real access to the justice system, the biggest users of legal services — corporations and wealthy individuals — pay an enormous price. Legal expenditures are growing at a rate faster than increases in the gross national product. Productivity is affected by the drain on time and money available for other endeavors... Although courts are vitally important for protecting private rights and concerns, the delay and costs may render them ineffective in discharging this critical duty."[3]

Experience has shown us that many government agencies often write rules that are ineffective and unnecessarily expensive. The process tends to produce regulations that have little or no political legitimacy. The legitimacy of a regulation now rests solely on the ability of interested parties to participate in a formal, structured rulemaking proceeding designed to insure that the agency reaches a rational decision.

It is becoming increasingly obvious, then, that court is often the wrong place for public policy disputes. The issues are too complicated and technical, adversarial procedures too time-consuming, and legal costs too high to permit exclusive reliance on the legal system for resolving social questions involving powerful competing interests. As my friend David Abshire, the former president of the Center for Strategic and International Studies at Georgetown University, put it recently:

"...the complex problems that our society will face in the remainder of the twentieth century will require more constructive methods of formulating solutions. The adversarial process, while important to our system of law and government, cannot be the only means of devising public policies."[4]

A similar argument can be made with respect to court battles over government regulations. Because legislation, especially at the Federal level, is necessarily broad and general, responsibility is delegated to Executive Branch agencies for promulgating the detailed rules and regulations by which the laws are applied. The process of making these rules allows for considerable

discretion on the part of agency officials, and the regulations resulting from the expensive and time-consuming rulemaking process often are challenged by affected parties and groups who disagree with the agency's ultimate interpretation of legislative intent. Thus regulations which may take four or five years to promulgate can be delayed for years beyond that by court challenges, frustrating the will of the legislature and possibly endangering public health and safety in the process. Irving Shapiro, the former chairman of the DuPont Co., stated the problem well in a 1981 interview with the *Washington Post*:

"...the system says we must be adversaries...you've got single issue groups on one side pressing the agency, you've got people in the agency pressing for their own viewpoint, and then you've got people in the industry pressing for their viewpoints, and each one is shooting at the other. Ultimately you wind up in court and then work out the compromises afterward...you have to go through all that agony to do something that you should have been able to do at the beginning."[5]

Can't the education, talent and expertise of our 600,000-plus lawyers be used at times to help bring about compromise and consensus, rather than contributing exclusively to costly and excruciating adversarial confrontations that often do more harm than good?

The question I would ask with respect to this situation is: Isn't there a better way? Can't the education, talent, and expertise of our 600,000-plus lawyers be used at times to help bring about compromise and consensus, rather than contributing exclusively to costly and excruciating adversarial confrontations that often do more harm than good? In a society as richly diverse and fiercely independent as ours, there will always be a variety of worthwhile goals and values, and some of them will inevitably collide. Just look at the sometimes bitter debate between those promoting industrial development and new jobs and those arguing for clean air and clean water. Must such values always be viewed in an "either-or" context and cast into a forum that forces both sides to take extreme positions and hold out to the "bitter end"? When such values do conflict, must there always be a winner and a loser? Or are there other means of conflict resolution available that can, under the proper circumstances, facilitate understanding, insure that all affected parties are represented in the decision-making process, and produce a consensus solution that will be at least roughly acceptable to all parties, and thus be more likely to endure?

Fortunately, the answer to that last question is "yes." The growing recognition of the need for alternative methods of dispute resolution has produced a number of highly creative projects and proposals in recent years for obtaining consensus on public policy issues without resorting to the courts. The American Bar Association has established a Special Committee on Alternative Means of Dispute Resolution to study and promote conflict resolution as a complement to the court system.[6] Organizations such as the National Institute for Dispute Resolution have been created within the last few years to examine and support ways of settling disputes without litigation.[7] One Institute project is helping to fund statewide offices of mediation to help settle intergovernmental and public policy disputes. This year the Center awarded grants to create such offices in Alaska, Massachusetts, New Jersey, and Wisconsin. Other states, including Virginia and Connecticut, have used *ad hoc* mediation to negotiate environmental and annexation/boundary questions and to determine the allocation of Federal social service block grant funds.

On the national level, some of the most successful examples of alternative dispute resolution have occurred in the mediation of environmental conflicts involving such issues as the siting of energy

projects, the control of toxic substances, and air quality.[8] Perhaps the best-known and most thoroughly documented of these efforts was the National Coal Policy Project, which brought together more than 90 representatives of leading industrial and environmental groups, under the aegis of the Center for Strategic and International Studies, to hammer out a consensus on national policy issues, ranging from environmental protection to civil rights, public health, job safety and consumer protection.

In 1981 in an attempt to apply the lessons learned from the Coal Policy Project to reduce conflict and delay in the Federal regulatory process, Senator Carl Levin of Michigan and I introduced legislation aimed at encouraging Federal agencies to sit down with interested parties to negotiate the terms of Federal regulations, before the regulations are proposed and the adversarial process takes over. Instead of relying on the courts, the Congress or the President to reform the regulatory process, as most other proposals do, our plan was to draw on the resources of the American public to bring conflicting interests together for negotiation and resolution of regulatory disputes.

Under the rulemaking procedures by which the government now operates, lawyers retained by parties who may be affected by pending regulations habitually contest every stage in the development of new rules, from the time a proposal is first published in the Federal Register to a final decision, years later, by an appellate court. This litigiousness, while adding substantially to the cost and time required to promulgate a regulation, rarely improves the final product, because the agency typically formulates a regulation early in the process and then closes its mind to any suggestions offered in an adversarial setting. Experience has shown us that when government agencies are granted such sweeping discretion to formulate regulatory policy, they often write rules that are ineffective and unnecessarily expensive. Even more troublesome is the fact that the current process tends to produce regulations that have little or no political legitimacy. The legitimacy of a regulation now rests solely on the ability of interested parties to participate in a formal, structured rulemaking proceeding which is designed to insure that the agency reaches a rational decision. But even with the most well-developed factual record possible, wide policy choices always remain, and the agency's ability to exercise wide-ranging descretion is bound to leave some or many powerful political interests dissatisfied with the regulation and the process by which it was developed. These "wronged" parties then accuse the agency of inadequately crediting their policy arguments or rejecting important facts or giving excessive credit to the views of another party. Since there is no objective measure of whether the agency made a good choice at any stage of the process, it is only the procedures themselves that provide legitimacy, and when the procedures are challenged, the entire process quickly falls apart and the whole bucket of worms ends up in court.

What is happening, in essence, is that we are trying to make fundamentally political, legislative choices by means of procedures derived from litigation. We are understandably upset when these procedures produce confrontation and delay instead of sound public policy. I believe we must try to make use of the *legislative* process, as opposed to the legal process, to make the kind of public policy decisions that are involved in writing regulations. We need to develop a process by which a consensus on the policy choice can be reached directly by the competing interests, rather than allowing each party to try to influence the agency, which is now cast in the role of an umpire, attempting to weigh the competing claims of the various interests. [10]

To accomplish this, Senator Levin and I proposed the establishment of negotiation committees, which would attempt to resolve regulatory disputes *before* proposed regulations are drafted. [11] Under our proposal, either the agency or any interested party could petition for the formation of a negotiation committee during

the early stages of the rulemaking process. A mediator, acting under the auspices of the Administrative Conference of the United States, would then determine whether negotiation seemed feasible and whether a negotiation committee representing all affected and interested parties could be convened to discuss the pending regulation.

If the mediator felt that negotiation was possible and if the agency concurred, a committee consisting of representatives of industry, public interest groups, state and local governments, labor, and other affected interests would meet with agency officials and attempt to find common ground. If the committee was able to reach a consensus, and the agency found the proposal acceptable, it would then publish the proposed regulation in the Federal Register and proceed with the other formalities of rulemaking. Thus our proposal would resolve most disputes through negotiation at the outset of the regulatory process, rather than after years of costly litigation.

These negotiation committees would be most likely to succeed when the number of affected interests is limited and when each interest has sufficient political and financial clout to block or greatly delay a regulatory proposal it finds unacceptable. Obviously if any one party has the power to impose its will, it will attempt to do so regardless of the procedure used, whether it be negotiation, litigation, or appeals to Congress for changes in legislation. But parties of roughly equal power would have an incentive to participate in the negotiations because they would be sharing in the decision and would have an opportunity to make tradeoffs and eliminate or mitigate the most troublesome aspects of a proposed regulation. In my view, all the parties would be in a better position to maximize their relative interests under this procedure than through the existing process, which produces rules beyond the control of any of the affected parties.

I realize that this proposal raises complex legal questions, and even though similar procedures have worked well in settings analogous to rulemaking, there is no guarantee that it would work as envisioned. A number of other approaches have been suggested, and all deserve close scrutiny. It is time to look beyond traditional government practices and procedures and to develop new mechanisms for resolving conflict and for developing regulatory policy. Today's regulatory system contains so many procedural protections, paperwork burdens and opportunities for court challenge that it has become close to impossible for the government to function at all, let alone with any degree of effectiveness and efficiency. Finding better ways to resolve disputes, within the regulatory process and in public policymaking in general, is one of the greatest challenges facing the government — and the legal profession — today. □

FOOTNOTES

1. NAACP v. Wilmington Medical Center, 491 F.Supp. 290 (D.Del. 1980), affirmed en banc, 657 F.2d 1322 (3d Cir. 1981).
2. *Paths to Justice: Major Public Policy Issues of Dispute Resolution* (Report of the Ad Hoc Panel on Dispute Resolution and Public Policy) (Washington: U.S. Department of Justice Federal Justice Research Program, 1984), p. 7.
3. *Ibid.*, pp. 8-9.
4. Francis X. Murray and J. Charles Curran, *Why They Agreed: A Critique and Analysis of the National Coal Policy Project* (Washington: Center for Strategic and International Studies, Georgetown University, 1982), p. vi.
5. "DuPont's Irving S. Shapiro: Summing Up a Life in Business," *The Washington Post*, Feb. 8, 1981, p. G2.
6. Publications of the Committee are available from the Special Committee on Dispute Resolution, American Bar Association, 1800 M. Street, NW, Washington, DC 20036.
7. Publications are available from the National Institute for Dispute Resolution, 1901 L. Street, NW, Suite 600, Washington, DC 20036.
8. *See* Allan R. Talbot, *Settling Things: Six Case Studies in Environmental Mediation* (Washington: The Conservation Foundation, 1983); Lawrence Susskind and Alan Weinstein, "Towards a Theory of Environmental Dispute Resolution," *Environmental Affairs*, Vol. 9:311 (1980), pp. 311-57; "EPA, Looking for Better Way to Settle Rules Disputes, Tries Some Mediation," *National Journal*, March 5, 1983, pp. 504-6; "Does Negotiation Hold a Promise for Regulatory Reform?", *Resolve*, Newsletter of the Conservation Foundation, Fall 1981, Gail Bingham, *Resolving Environmental Disputes: A Decade of Experience* (Washington: The Conservation Foundation, 1984).
9. Francis X. Murray, *Where We Agree: Report of the National Coal Policy Project* (1978); J. Charles Curran, ed., *National Coal Policy Report 1979: Report of a Seminar at the Colorado School of Mines*; Francis X. Murray, *Where We Agree: Issue Papers* (1979); Francis X. Murray, *Where We Agree: Recommendations of the Mining Task Force* (1979); Francis X. Murray, *Where We Agree: Report of the National Coal Policy Project: Summary and Synthesis* (1979); Francis X. Murray, ed., *National Coal Policy Project: Final Report* (1981); Francis X. Murray and J. Charles Curran, *Why They Agreed: A Critique and Analysis of the National Coal Policy Project* (1982) (Washington: Center for Strategic and International Studies, Georgetown University).
10. *See* Philip J. Harter, "Negotiating Regulations: A Cure for Malaise," *The Georgetown Law Journal*, Vol. 71:1 (1982).
11. *Congressional Record*, 97th Congress, 1st Session, Sept. 9, 1981, pp. S9328-30.

THE WHITE HOUSE – JUNE 1914

A delegation of the Delaware Bar calls on President Wilson to urge the appointment of Victor B. Woolley to the Federal bench.

"NOW THE FIRST THING WE DO . . ."

THE SWAN OF AVON BARES HIS FANGS AT LAWYERS AND A LAWYER-POLITICIAN BITES BACK

MICHAEL N. CASTLE

As you will see from Mike Castle's article below, he is witty as well as wise, and, armed with insights drawn from legislative service, capable of a shrewd, detached appraisal of his profession in the toils of representative government.

This bare recital gives a very poor notion of how deeply Mike Castle has probed the issues confronting state government today. He has lead a blue ribbon committee inquiring into the quality of public education and proposals for improving it. He has headed the Governor's Task Force on Drunk Driving. Mike has become expert on the problems of restitution to victims of crime. He has been active in the labors of groups wrestling with the difficulties facing the aged, the young, and the unemployed. Lieutenant Governor for the last four years, Mike now seeks to be Governor, the top elective office in the state, an office to which he would bring enviable credentials of training and public experience.

It is a particular pleasure to have been asked by the Editors to reflect upon the role of lawyers in the legislative process. I say this because

(Continued on page 22)

THE DUTY AND PRIVILEGE OF SERVING

A CANDIDATE ENUNCIATES HIS PHILOSOPHY OF PUBLIC LIFE

WILLIAM T. QUILLEN

Lawyers belong in politics for three distinct, albeit related, reasons: obligation, craftsmanship, involvement.

In an address at Vanderbilt University in 1963, John F. Kennedy said:

"The educated citizen has an obligation to serve the public. He may be a precinct worker or President. He may give his talents at the courthouse, the statehouse, the White House. He may be a civil servant or a Senator, a

(Continued on page 24)

Bill Quillen is the Democratic nominee for Governor of Delaware. His candidacy is the logical next step in a professional life of nearly uninterrupted service to his state. In 1965 he withdrew "temporarily" from a promising career in private practice to serve a newly elected Governor, The Honorable Charles Terry. A year later the Governor nominated Bill for the Superior Court bench. After service as a judge, he became Chancellor of Delaware and eventually joined an enlarged Supreme Court as an Associate Justice. He exemplifies the old-fashioned ethic of public service as an obligatory means of redressing the servant's unequal advantages of good fortune, strong intellect, and good education.

Bill is a scholar, and, as such, intensely concerned with quality in education. He has taught at the Delaware Law School and remains active as a Trustee of its parent, Widener University. His diverse contributions to the public good include service as a decidedly youthful Elder of the New Castle Presbyterian church and as Vice President and Director of the New Castle Historical Society. His article articulates the philosophy he lives.

(Continued from page 20)
the forum in which this topic is normally discussed — Legislative Hall — occasionally regards our profession with all the warmth that the Confederacy held for General Sherman. Indeed, to while away the hours spent presiding over the Delaware State Senate, I have carefully catalogued the legislative observations about lawyers. Let me recite two samples:

"Mr. President, we have been given three different legal opinions from three different lawyers. Would you please instruct those lawyers to retire to a common place and flip a coin?"

"Mr. President, would you please clear the chamber of all lawyers so that we can get something done?"

Although these remarks are often made in jest, it passes for conventional wisdom in Legislative Hall that the process of making legislation (which some pundit has likened to the process of making sausage) — is somehow impaired by the presence of lawyers. All this puts me in mind of the oft-quoted words of Dick The Butcher in Shakespeare's Henry The VI, Part 2: "The first thing we do, let's kill all the lawyers." Dick The Butcher's sentiments are usually repeated by those critics of our profession who wish to demonstrate that even Shakespeare, that chronicler of universal truths, shared their disdain for lawyers.

No so. Instead, a reading of the full passage in which those words were uttered will show that Shakespeare more probably regarded lawyers as protectors of the Common Weal from tyranny, anarchy, villainy, oppression, and the General Assembly.

Let me set the scene. In Act IV Jack Cade has gathered his group of rebels about him. Listen and see if his proposed "reforms" have a certain air of election year familiarity —

"CADE: Be brave, then; for your captain is brave, and vows reformation. There shall be in England seven halfpenny loaves sold for a penny; the three-hooped pot shall have ten hoops, and I will make it a felony to drink small beer. All the realm shall be in common; and in Cheapside shall my palfry go to grass: and

I believe that the Bar holds a public trust of rendering aid to the legislative process. This public interest can only be served where there exists a relationship of respect and trust between the General Assembly and the Bar.

when I am King, as King I will be, . . . there shall be no money: all shall eat and drink on my score; and I will apparel them all in one livery, that they may agree like brothers, and worship me their lord.

DICK THE BUTCHER: The first thing we do, let's kill all the lawyers."

After settling upon the hasty demise of all lawyers, the band next proceeds to sentence to hanging a young town clerk who has committed an unpardonable sin — he has learned to write his name! Thus, to Jack Cade's band, education and literacy were capital crimes for which the ultimate penalty must be paid.

And so it goes, even in 1984. I am sure the reader will share my sense of déjà-vu when listening to Jack Cade's words. Indeed, no legislator worth his salt has failed to fill the legislative record with a similar speech.

Ah, but enter the lawyers, those princes of darkness, who quickly point out that imposing price restraints upon bakers of loaves would probably violate the Commerce Clause; that prohibiting the sale of small beers would be inconsistent with recent legislative efforts to reduce drunk driving and would probably encroach on the powers of the Alcoholic Beverage Control Commission; that holding "all the realm . . . in common . . . " would be an unconstitutional taking of property without due process; and that providing free food and drink to all would require an appropriation that would blow the 98% limit to smithereens!

Thus we see that, in the legislative scheme of things, lawyers are perceived as negativists who are constantly instructing legislators about what cannot be done, rather than what can. In that sense the lawyer has become a sort of legislative hall monitor who must inspect the "pass" of Johnny the Legislator before the latter can complete his rounds.

Such a perception should not and need not exist. From the perspective of our profession, it does no good to be regarded in the forum where laws are made as a bunch of naysayers. More important, the Bar should be regarded by the public as a resource upon which lawmakers can rely in shaping legislation free of unintended and unhealthy side effects.

As you may know, the Bar Association has recently taken steps to improve both its image among legislators and its legislative presence. I speak of the Association's annual reception for members of the General Assembly as well as its retention of a legislative representative.

We need, however, to do more. The Association should better acquaint legislators with our recent reorganization by sections. Each section should consider delegating, to a member or members, the specific responsibility of closely monitoring legislation and discussing forthcoming legislative proposals with sponsors and Committee Chairmen. Legislators should become accustomed to looking beyond their own meager staff resources to the profession as a whole for assistance in bill drafting.

The benefits of improving a relationship between the Bar and the General Assembly are primarily two. First, I continue to believe that the Bar holds a public trust, the discharge of which includes rendering aid to the legislative process. This public interest can only be served where there exists a relationship of respect and trust between the General Assembly and the Bar. Second, with an increased understanding of the legislative process, individual practitioners can enhance their ability to serve their clients' interests. It has always struck me as odd that so few lawyers in Delaware include legislative lawyering skills in their arsenal of weapons. Those who

do understand the workings of the legislative process are well aware that results can be achieved legislatively for one's client that may not have been possible otherwise. The lawyer who regards the Delaware Code as a static "given" overlooks a method by which to present a client with significant new opportunities or relief from current unnecessary burdens. It is remarkable that so few Delaware lawyers can distinguish between the men's room and the caucus room in Legislative Hall.

As a prerequisite for membership at the Bar, we require that applicants perform a variety of tasks—the clerk's "checklist"—thought appropriate to the rounding out of a lawyer. Perhaps serious thought should be given to including a legislative "primer" in that checklist.

In the legislative scheme of things, lawyers are perceived as negativists who are constantly instructing legislators about what cannot be done, rather than what can.

Turning back to Dick The Butcher, it is obvious (I hope), that I have exaggerated to make my point. To be sure, there are times when lawyers can feel perfectly safe entering Legislative Hall without flak jackets. Indeed, those of you who are considering venturing forth to Dover can generally expect cordial cooperation. Nor do I mean to suggest that a diploma from law school confers any special wisdom upon the recipient. But it does, or should, evidence that the recipient has spent a significant part of his or her life studying the role that laws and lawmaking have in our society. We, as a profession, should use that insight to ensure that the general Assembly's work product consists of legislative acts that are carefully drawn in order to suit the sponsor's purpose.

Bring on Dick The Butcher! I will either debate him in the forum of his choice or hire him to be my campaign manager. □

(Continued from page 21)

candidate or a campaign worker, a winner or a loser. But he must be a participant and not a spectator." While President Kennedy was not a lawyer, his words are well directed to lawyers. It has been my pleasure, in my capacity both as a Supreme Court Justice and as a practicing attorney, to speak at the Pre-Admission Conference for law graduates about to be admitted to the Bar. I have tried to note the special public obligation that falls upon lawyers, who are officers of the court and therefore public officers by occupation. Governor du Pont is a lawyer, Senator Roth is a lawyer, Senator Biden is a lawyer. In the gubernatorial race in 1984 lawyers from both parties are running. We lawyers should be proud of our political heritage and we should feel bound to join in that proud tradition of service.

For some of us a sense of obligation to public service has another feature unrelated to profession. In my lifetime, there have been three wars — World War II, the Korean War, and Vietnam, to say nothing of many other temporary national emergencies, which have involved direct military conflict, death, and injury. Admitted or not, there is a sense of guilt about not having served in the military at a time and place of ultimate individual risk. This is true even if many of us who fall in that category are peacetime veterans. If one did not have to face the ultimate risk of the wartime veteran, then one has a special obligation to render alternative service. It is the price of the privilege of being an American.

If one did not have to face the ultimate risk of the wartime veteran, then one has a special obligation to render alternative service. It is the price of the privilege of being an American.

So the lawyer should enter politics primarily with a sense of public obligation. But there is more to it than that. Lawyers have something special to offer in government service. *Government is law. It is our craft.* While I would never belittle the vital task the lawyer plays in serving clients, there is a broader satisfaction in serving the public at large. Individual cases are important, but they rarely involve the lawyer in a contribution to history, however local the history may be and however anonymous the contribution.

This special feeling of contribution comes to me from American history, from the number of lawyers among the Founding Fathers. When one remembers the Continental Congress or the Constitutional Convention, one cannot but be struck by the constructive contribution of lawyers. One need only mention Adams, Jefferson, and Madison. They were indeed builders of society, and we lawyers and the public at large both revere their craftsmanship. The best way for the Bar to rekindle that reverence is for lawyers, professional men and women, to exercise fully their craft and to contribute constructively to the evolution of American society.

Lawyers are good technicians — draftsmen or critics of draftsmen. But, if one had to characterize a public notion of legal craftsmanship, I would emphasize the compromising ability of the negotiator rather than the harsh combat of the litigator. While the combatant might be better at getting elected, the negotiator can best serve. Because of the academic demands on the profession, lawyers should be a source of creative brainpower like other educated people. But lawyers should have a special capacity in method, a capacity to lift public debate beyond partisan rhetoric. Lawyers, because of their familiarity with process, should be better able to balance competing interests and to reconcile the differences in society. At the Constitutional Convention in 1787, an aging Benjamin Franklin, a non-lawyer, wrote out his reasons for approving the Constitution, despite some reservation. He made an eloquent plea, concluding:

"On the whole, Sir, I cannot help expressing a wish that every member of the Convention who may still have objections to it, would with me, on this occasion doubt a little of his own infallibility — and to make manifest our unanimity, put his name to this instrument." To me, that Franklin quotation, like the words of President Kennedy above, has special meaning for lawyers as negotiators.

A third reason why lawyers should participate in politics has to do with the change in society. When the United States were predominantly small town and rural, lawyers were prominent people in grassroots America. In my hometown of New Castle, I am occasionally reminded of this heritage when I hear someone refer to "Lawyer Cooch" or "Lawyer Herndon". But with the suburbanization of residential patterns and the increasing centralization of business and industry, the lawyer tends to work in a climate different from that surrounding the average citizen. Even lawyers with practices centering on topics like family law tend to get clients because of their specialties and not because of the neighborhoods in which they live or work. These changes in residential and work patterns have produced a professional class to a degree isolated, out of contact with the problems of a societal cross section.

Participation in politics dramatically changes a lawyer's life. Things that are important to others necessarily become important to the political lawyer. Is there service discrimination in what sections of town get adequate trash pickup? Drug problems are not mere statistics or even cases but rather the physical hurt of criminal acts. One learns that the biggest demand of welfare recipients and their advocates is not increased benefits but jobs. In short, politics is good for the lawyer because he must be involved with the full spectrum of the citizenry. And politics by lawyers is good for that citizen spectrum because lawyers know how to make a difference.

So beyond obligation and craftsmanship, the lawyer in politics makes an emotional commitment to people. Politics, properly practiced, takes the emphasis off self. There is an involvement, which is perhaps broader than any other activity. The hurt of humankind is my hurt and the joy of a diverse humanity becomes my joy. Politics is an instrument to bring lawyer talent to human needs. No one ever put it better than Justice Oliver Wendell Holmes: *"Life is action and passion. I think it is required of man that he should share the action and passion of his time at peril of being judged not to have lived."*

In Delaware we lawyers sometimes take ribbing by non-lawyers too seriously. Non-lawyer politicians brag when there are no lawyers in the General Assembly. But the very same people tend to rely on the few lawyers who sporadically serve as legislators. It is the lawyers who take the barbs seriously, perhaps because lawyers, like doctors, do not always distinguish between their expertise and their large regions of unsuitability. We fail to temper the importance of position with a sense of perspective and humor. Lawyers should learn to listen as well as to advise. If we did, our more restrained advice would get a better reception. Our natural sense of obligation should not be diminished by a feeling that we are not welcome. We are welcome as well as needed as long as we do not take ourselves too seriously. We are needed because we are an integral part of humanity, and not because we operate in an independent sphere.

The reward of politics is the opportunity to contribute, to give of one's self. There will be no significant personal monuments. Governors are as fleeting as actors on the stage, but they can make lasting contributions to society. I remember how Governor Terry fought so hard for our State-supported Delaware Technical and Community Colleges. He literally stood alone when the project started but he believed in it and his belief was powerful. And when we think of the thousands of Delawareans who owe their livelihood to Governor Terry, we realize that one person can make a difference. Notable deeds (Governor Peterson's Coastal Zone Act another example) can survive our

memory of the benefactor.

We lawyers must realize that we are viewed as part of a power structure. During the course of this campaign, I have encountered a theme that I call "the arrogance of power".

Since it seems to me that one of the main tasks of a Governor is to reconcile different interests and offer people on opposite sides of society's bargaining table a means of communicating and uniting, I hope lawyers will look at problems faced by others from those others' point of view. See if we cannot feel, as they feel, an arrogance of power.

The unemployed worker is told that unemployment compensation is an employment benefit to which he is entitled for periods of hardship. And yet, for those city residents who frequently suffer the greatest hardship, the unemployment office moves from an accessible place in center City to an inaccessible place elsewhere.

An elderly widow is entitled to more than one social service benefit, for example, general assistance and food stamps. For each benefit she has to fill out a complex need form. Neither bears any resemblance in form or substance to the other.

An Hispanic wants to vote. He sends in the card requesting a voter registration form, thinking he has already registered by that act alone. If he is fortunate, he will get by return mail a computerized registration form with the now customary blocks for individual letters and numbers, a form totally incomprehensible to him.

People must count and those with power, public and private, must address people's needs. This is the challenge to the citizen lawyer in politics. We must feel the hurt, be involved, use our craft, and fulfill our obligation by contribution.

A blue collar couple own a home in a modest, well-kept middle-class neighborhood, and have purchased, with life savings, several investment properties in that neighborhood. After resident tenure of 40 years, the couple learn that a large but relatively unobtrusive railroad is becoming a 24-hour deafening crane operation.

A black family with a first grader find themselves not the beneficiaries of court desegregation but the victims: there is no first grade within their City district and no teacher in the assigned school with empathy toward their child.

A State merit system employee is told there is a personnel system and no special consideration can be given her salary needs, while she views that system exempting those for whom the administration cares, solicitous of special employment categories, ready, if not eager, to accelerate a pension for a judge denied reappointment.

There are many people out there who feel helplessly victimized by what we power brokers are doing. Does society really want to help the unemployed? Is society hypocritical in social services benefits by its intentional roadblocks to needy recipients? Do we believe that all citizens should have equal access to the polls? Would society's reaction be the same if Greenville were threatened as it is when Elsmere is threatened? Do courts consider the people impact of sweeping decrees? Can systems exist if they are ignored at will?

People must count and those with power, public and private, must address people's needs. This is the challenge to the citizen lawyer in politics. We must feel the hurt, be involved, use our craft, and fulfill our obligation by contribution.

One final word. I was campaigning one day in the Hispanic district on Fourth Street in Wilmington. I encountered on a porch a small boy with a friend. Because of a birth defect the fingers on his right hand were short and malformed. I shook his hand with my own right hand, with three fingers shortened in a lawnmower accident a decade ago. His friend told the boy in Spanish that I had a hand just like his and I was running for Governor. The boy gave a long, hopeful smile. I hope his day will come. Politics is worth it. □

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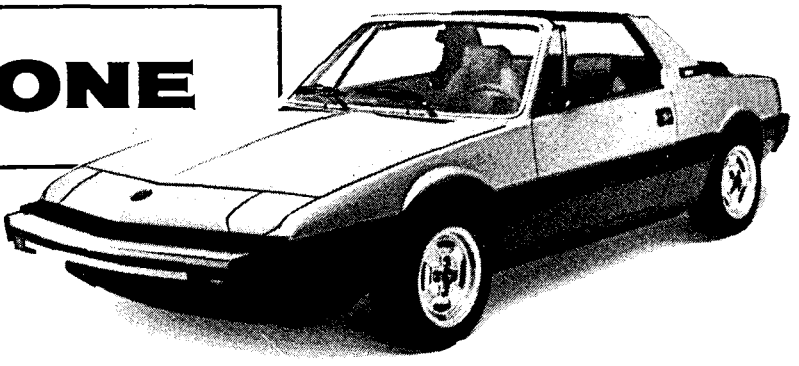

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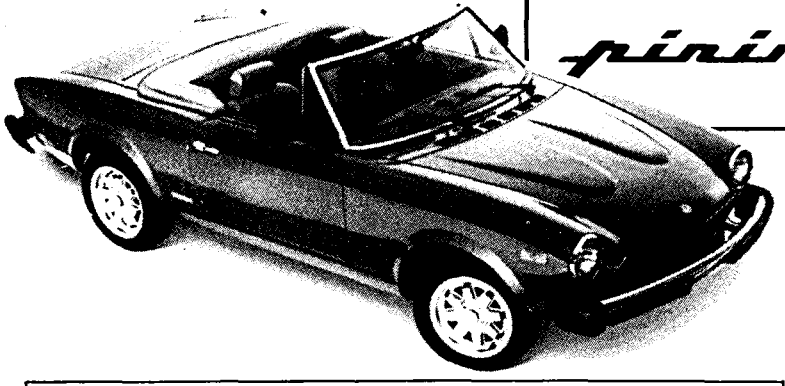

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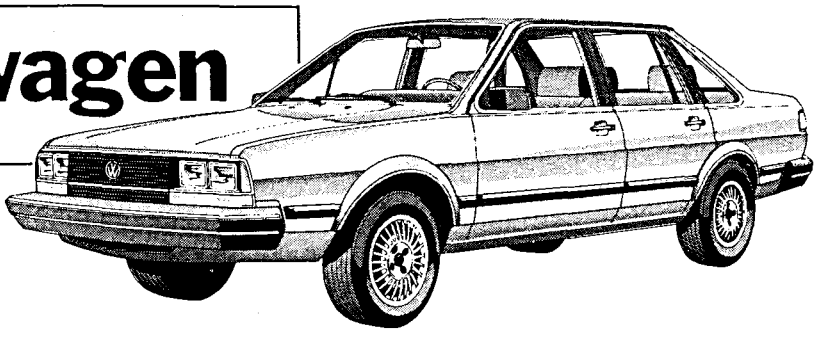

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ORLANDO J. GEORGE, JR.

There is a story that is told about a member of the Delaware State Legislature. He was quite active in the National Conference of State Legislatures and attended conferences and meetings of this group all over the country. Whenever he found himself in a group of his peers from various states, the subject would inevitably turn to the composition and membership of the Legislature in which each one served. And time and again this particular Legislator would amaze the others by announcing "There are no lawyers in the Delaware Legislature!" This bit of news never ceased to astound the elected officials from other states because for a while, you see, we were the *only* state in which that situation existed. From 1976 to 1982, not one single lawyer served in the Delaware General Assembly — a bit of trivia, but nonetheless true. And of course, the question which immediately follows the announcement of that fact is and was — is that good or bad?

Let me spend the next few moments deliberating that question. Does a state Legislature need the input, knowledge, and particular perspective of a member of the legal profession in order to best fulfill its role as a lawmaking body? There are some who would answer with a definite yes, myself included, and some who might ponder a moment before saying, perhaps not. Let's look at some of the reasons for both of those answers.

There are many ways in which lawyers bring special abilities to their roles as lawmakers. First, of course, is the fact that they have built-in expertise. Since the law is their field, naturally you expect that they would recognize the areas in which change in our society require change in the law. Just as the members of the Legislature who are farmers or bankers or civil servants know their areas better than any other and tend to introduce bills that display their expertise, so a lawyer member can be invaluable in pointing out where the vagaries or lapses in the law exist and should be amended.

Second is a lawyer's ability to analyze and critique bills while they are still under consideration so that technical flaws or potential unconstitutional aspects may be identified early. This has certainly been the case during the last two years when our one lawyer member, Representative Harry K. F. Terry, has on innumerable occasions helped the House find flaws in a bill while it is still a bill. He has been particularly expert as a member of the Judiciary Committee in this regard.

Third, a lawyer's ability to think analytically in general, not simply while evaluating a bill, is a definite asset in the legislative setting. We are often caught up in controversial issues, and it is helpful to have someone who is able to sit back and, with a broad perspective of the law as enacted by the legislature, administered by the executive, and construed by the judiciary, evaluate the situation and help us work out a compromise. As Speaker, I am often called upon to moderate compromise between members of the House who are on differing sides of an issue and who may even have bills that are totally opposed. Being able to turn to a lawyer, either a legislator or an outside practicing attorney, to get some help in this moderating task is a benefit.

In the House, lawyers' skills are revealed when they engage in debate. That is not to say, of course, that many of our non-lawyer members are not also excellent debaters, but the training lawyers receive in courtroom work

(Continued on page 32)

We are particularly pleased to have an article by Representative Orlando George. During the ten years he has represented his Wilmington district in the State House of Representatives he has run up a record of hard work and leadership that reflects more than mere diligence: it reflects the high regard in which he is held by his fellow legislators. Orlando George is presently Speaker of the House; between 1980 and 1983 he was the House minority leader.

Representative George is also held in high regard by lawyers. Last year the Delaware State Bar Association conferred its Distinguished Legislative Service Award upon him. It is but one of many distinctions, including the 1979 Good Government Award of the Committee of 39 and, in 1981, his recognition by the United States JayCees as OUTSTANDING YOUNG MAN OF AMERICA. It is a pleasure to welcome him to our pages.

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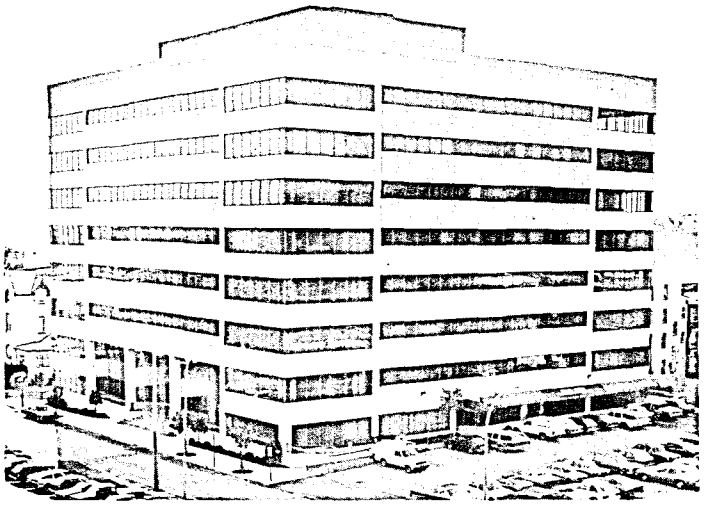

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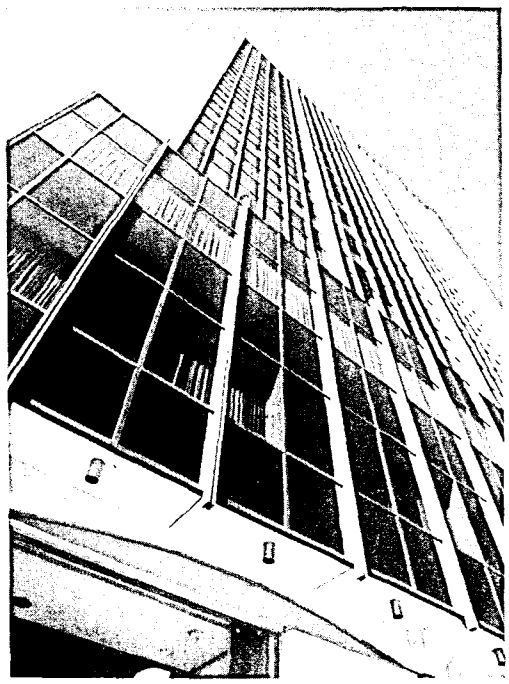

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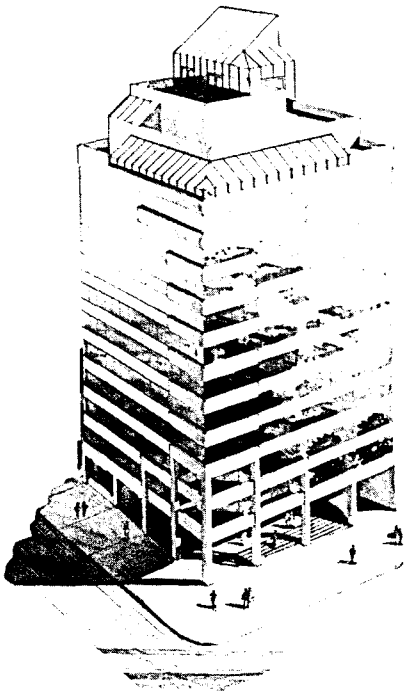

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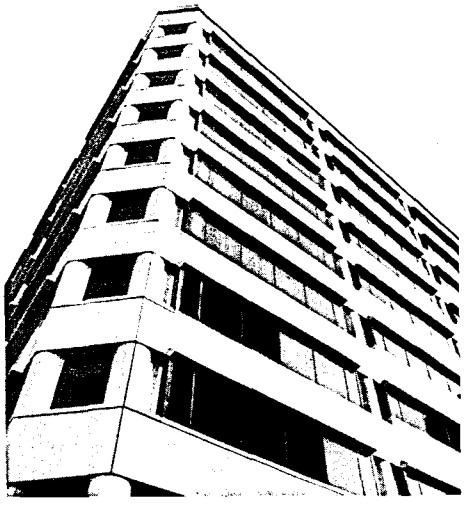

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(Continued from page 29)

certainly is a big help when they take the floor in a legislative body. It is a well known fact that some of our finest advocates in both Congress and state legislatures have been lawyers by profession.

Finally, a particular advantage in having a lawyer as a member of the General Assembly is the possibility of using that lawyer-member to help assure that the intent of legislators is clear for those who must enforce and interpret a bill once it is enacted into law.

On the other hand, there are some perceived negative aspects to having lawyers in the General Assembly, and, to be fair, I certainly feel I should mention those as well. First of all — I hasten to state that this has not happened in the last two years — it is possible that lawyers who are daily immersed in the law may get too technical for the average person. Citizen legislators rely on their common sense and general knowledge of government and civic affairs and do not inordinately concern ourselves with the legal technicalities of bills. However, I imagine it might be very difficult for a lawyer not to be drawn into those technical aspects while we are writing bills. Dotting every "i" and crossing every "t" could bog the Legislature down if carried to an extreme. There are also some who would say that having too many lawyers in a Legislature would tend to make that body more remote from the average citizen. It has always been the hallmark of the Delaware Legislature that our members are close to their constituents. We have representatives in the General Assembly from almost every group of citizens in the state — housewives, teachers, corporate businessmen, farmers, small businessmen. This is good, and if the composition of our Legislature changes drastically to include a preponderance of legal minds, as is the case in certain other states, many people feel we would be losing something that it is important to retain.

Another problem which has been mentioned is that lawyers may tend to be too technical! I've also heard it said that at times a lawyer can "overpower" the other members of a legislative body by innundating them with technical expertise or minutiae, which it is hard for the average layman to combat.

Finally there is the problem of compensation, which is a negative as far as attracting lawyers. A Legislator in the Delaware General Assembly at the present time is paid a salary of $13,440. This is a part-time position, it is true, but for lawyers whose time is reckoned by the hour and who need to spend a great many of those hours away from their practice, this can be devastating. Until the day that the salaries we pay to Legislators are commensurate with the time and effort that they must put into their jobs as elected officials, we will be hard put to attract persons whose business requires them to be personally present. This is an unhealthy situation and should be rectified. Perhaps with the formation of the new Compensation Commission, this problem will be addressed in the near future. Whether the arguments on either side of the question concerning lawyer legislators are strong is a moot point. Suffice it to say, that for six years Delaware had no lawyers in its Legislature; for the past two years we have had an excellent one, but he has decided not to run for re-election; and whether we shall have a lawyer in 1985 is still unknown! That is not to suggest, however, that lawyers are not involved in the General Assembly in other ways. They most certainly are.

For instance, both the House and Senate employ attorneys part-time to whom we turn for bill drafting, interpretation, and settlement of questions that arise on the floor of our deliberative bodies. We have been very fortunate to have secured the services of some excellent attorneys over the ten years that I have been a member of the House, and they do a superb job — for very little pay, I might add. Our present attorneys, Robert Aulgur, Francis Mieczkowski, Jr., and Ronald Smith are an invaluable aid to the House, and we appreciate tremendously the sacrifice which they make to serve us in this capacity.

Another way in which lawyers are involved in the legislative process is, of course, through lobbying. Many of the finest members of the Delaware Bar haunt the halls of Legislative Hall and buttonhole legislators day in and day out in pursuit of legislation or in opposition to other bills. Their expertise and advice are sometimes invaluable and, on many occasions, although slanted toward their particular perspective, an excellent aid to us in our deliberations. In addition, lawyers often appear as expert witnesses to clear up any question on the meaning of a certain bill, and sometimes the clash between lawyers representing opposing interests lights up the issue.

Finally, there is a service which lawyers or would-be lawyers perform for the General Assembly which many of the members of the Bar may not know about. For several years now, William Conner and his students at the Delaware Law School who are taking a bill drafting course have worked with us in a quasi-intern program to help us in *our* drafting. We are indeed grateful to these students and appreciate their time and the effort they have made on our behalf. There are also several lawyers who have volunteered their time as bill drafters and who have worked with us to improve the system in Dover.

In summary, let me go back to my original question, which raised the point — is it good or bad that the Delaware General Assembly has had so few lawyer-members in the recent past? I will have to leave the answer to that question totally up to you, but I can only muse that while there may not have been an attorney actually sitting in a seat in either the Senate or the House Chamber, never let it be said that the influence of the Delaware Bar has not been keenly felt in Legislative Hall for many years.

An able, responsible, and active Bar is necessary for an effective, responsive, and responsible leiglsature. The influence they have exerted, and the service they have rendered to our legislative process should never be underestimated! □

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A LAWYER-LEGISLATOR ASSAYS HIS ROLE

"WHY, YES, I DO HAPPEN TO BE A LAWYER BUT IT NEVER OCCURRED TO ME TO MENTION IT HERE."

HARRY K. F. TERRY

Harry Terry, a member of the prominent Dover firm of Terry, Jackson, Terry & Wright is our sole lawyer member of the General Assembly. After the November election he will return to private life and the full time practice of law. Harry's article shows that his two years in the House have been an enriching and educational experience, and that he has derived deep satisfaction from this experience. As appears in the companion article by Representative George, Harry became in a very short time an exceptionally useful and well liked member of the legislature. We are certain we are not alone in regretting his decision to retire.

Historically lawyers and politics have been as natural a mix as bricks and mortar. Lawyers have served as party office holders and have held positions in all levels of government, elective and appointive, since the Revolution. What group, after all, is better trained to create laws and administer them than lawyers?

Lawyers in Delaware are not unlike their brethren elsewhere in their degree of political participation. Although relatively few lawyers run for the General Assembly, lawyers are noticeably active in Delaware politics, and Legislative Hall has been a prime training center for lawyers who have continued in other forms of public service. Attorneys once active in the legislative process as office holders or as counsel to the House, the Senate, the Legislative Council, or the Governor's Office, and who have gone on to other public office include The late Governor Terry (House Attorney), Justice Christie (Director, Legislative Reference Bureau), Vice Chancellor Hartnett (Director, Legislative Reference Bureau and House Attorney), Judge Bradley (Governor's Counsel), former Justice Quillen (Administrative Assistant to the Governor), Judge Bifferato (Member, House of Representatives), Hon. Michael S. Purzycki (Senate Attorney), Lieutenant Governor Castle (Senator), Governor du Pont, (Member,House of Representatives), President Judge Stiftel (House Attorney), Justice Horsey (House Attorney), Secretary of State Kenton (House Attorney), Judge Kelsey (House Attorney, Judge Wahl (Senate Attorney), and Judges Bush and O'Hara (both House Attorneys). A stint in the legislative process, either as an employee of the Legislative or Executive branch or as a member of the General Assembly, is considered good basic training for any attorney desirous of serving the public.

If nothing else, involvement in the legislative process for an attorney is truly educational. It familiarizes him with almost every aspect of the Delaware Code, with much of which the average practicing attorney is totally unfamiliar. Most attorneys in "general practice" are roughly aware of Titles 6, 8, 10, 11, 12, 13, 21, 25 and 30 of the Delaware Code. The degree of familiarity varies with the area of specialization. For example, some of our brothers may be familiar with Title 8, (The General Corporation Law), to the extent of having committed it to memory, but there is a wealth of Delaware law unknown to them. When did you last look at the Delaware Constitution? If you have specialized since law school, probably never, and since there is rarely a need to study it, because of the demands of your practice, you may not suffer for your inatten-

tion. The same may be said of the other titles in the Code. But if you are a part of the legislative process you will become acquainted with many of the hidden secrets of the Delaware Constitution and Code. The significance of a "road or highway which forms a continuous road or highway extending through at least a portion of the three counties of the State," (Article II, § 19), the granting of criminal jurisdiction to inferior courts (Article IV, § 28), unlawful delegation of legislative power (Article II, § 1), the enrolled bill doctrine, and the significance of the title to a piece of legislation will all become clear to you in a few short months. Were you aware of Chapter 17 of Title 29? It provides that each member of the General Assembly shall designate not fewer than 3, nor more than 7, emergency interim successors to his powers in the event of said member's inability to attend legislative sessions as a result of, among other things, enemy attack, by "sabotage, bombs, missiles, shellfire or atomic, radiological, chemical, bacteriological or biological means". I designated my campaign manager, Rick Feutz, a member of the Lake Forest School Board, and two of my other friends. (They have promised to pass a concurrent resolution in my memory!)

If this is beginning to sound like a pitch to run for a seat in the General Assembly, so be it. That only a handful of attorneys in Delaware have become members of the General Assembly is puzzling to the rest of the country, given the consistently high percentages of attorneys in other state legislatures. I recommend it as one of the most enjoyable ways of performing public service. Most attorneys think nothing of spending endless hours of otherwise billable time in public service, as members of Boards, commissions or civic organizations, in charitable endeavors or as active members of the State or American Bar Associations. Why not in the Delaware Legislature? A lawyer has a special perspective valuable to the legislative process and, therefore, valuable to the State as a whole. Many legislators do not grasp long range ramifications of a particular act of legislation, but lawyers understand the legal process by which we govern ourselves, so that as legislators they can be instrumental in heading off disaster as well as initiating improved law and greater governmental efficiency. It has been said that the only bill that *must* become law is the annual appropriation for State expenditures. In the legislature, lawyers can help filter out bills that are unnecessary or dangerous.

Many of you will wonder how the following example of silly, disruptive law making ever got as far as it did. Two New Castle County gentlemen had a boundary line dispute over a small strip of land between their farms. The value of the land was minimal. One brought suit as a "matter of principle". I once had a similar case, which went to trial before Judge Stiftel, in which the value of the land was also minimal ($800.00 more or less). After counsel disclosed the value of the land to the Judge in opening remarks and further stated that this case, too, was "a matter of principle," Judge Stiftel asked, "How do you spell that, ple or pal?" The same comment could apply to the first boundary line dispute, but my case ended after a decision from the trial judge. The first quarrel, which latter found itself the subject of legislation in the General Assembly, went through a trial, several appeals, and at least one criminal proceeding after one of the parties, while in the disputed area astride his John Deere, was fired upon by the other. All judicial remedies exhausted, the losing party sought a legislative remedy. It took me and other House members many hours and much valuable time in House Judiciary Committee meetings to convince the sponsors of the legislation and the aggrieved constituent that the abolition of the doctrine of adverse possession was not the best method of preventing this kind of "injustice" from occurring in the future. The bill did manage to pass the House the year before I came to the General Assembly. It died in the Senate late in June that year.

If one cannot justify running for the General Assembly for

altruism, there are nonetheless material advantages. Billable hours are not entirely lost. There is a bi-monthly paycheck and expense allowance, however modest. The endless flow of jumbo shrimp and clams casino at receptions hosted by interest groups should not be underrated. The ability to fill a pothole or re-surface a suburban street can generate good will in one's community that will endure for years. Many of us can afford to be generous with our time as attorneys if it offers the promise of future benefits. Let me say only this. There are more pleasant ways of cultivating the general good will of the community than attending school board meetings or serving as a director of a charitable society.

If you are considering a run for the General Assembly, remember that lawyers are not viewed by the community as necessarily selfless contributors to the public good. I began writing this article while I was on vacation during the Easter recess of the General Assembly. One morning at breakfast I overheard three elderly men in a conversation condemning lawyers in terms many of us have doubtless heard before. These gentlemen appeared affluent and were well spoken. One of them said, "This country is a country of laws. Lawyers use these laws for their own benefit. They are the most dishonest people I have ever known." The other two muttered agreement. I still wonder if, after I left, they might have discussed regulations they could promote for the boards or commissions that regulate their professions to limit the number of new licenses "to strengthen the profession and protect the consumer".

That lawyers are frequently held in low regard is distressing. It seems that individual lawyers, however, can gain the trust and confidence of the public almost as if they were somehow different from the group to which they belong.

Politicians suffer from the same sort of public distrust and, like lawyers, can individually earn the same sort of "you're not like the rest of them" respect. I wonder what the three men at the breakfast table would think of a lawyer/politician. Lawyers actively involved in politics, especially those who hold public office, must overcome a two-sided offensive. A lawyer seeking legislative office must first allay the suspicions of his potential constituents and, if successful on election day, pass muster with his legislative colleagues.

When I ran for the House of Representatives in 1982, I found myself avoiding out and out declarations to the voting public that I was a lawyer. I am proud of having become a member of the Delaware Bar, an accomplishment that requires a great deal of effort. However, a candidate for public office, one who by definition is offering himself for public service, must have in the eyes of many, qualities inherently different from those we expect in a good lawyer, the kind of lawyer those very same voters would select in dire circumstances. Although typical voters acknowledge that a lawyer's special training is invaluable in the legislative process, many feel uncomfortable voting for one, unless they can rationalize somehow that a particular lawyer/candidate is "really not one of *them*".

If one does manage to convince the electorate that a lawyer is an acceptable person to represent them, a more difficult task lies ahead. The General Assembly consists of 41 Representatives and 21 Senators none of whom, with the exception of myself, is a member of the Delaware Bar. As Senator Richard Cordrey is fond of reminding me, I "ruined a perfect record". There were no lawyers in the General Assembly until I was elected — none since Mike Castle stepped down from the Senate in 1976. Any legislator who wants to represent his district effectively must also be effective in dealing with his colleagues in the General Assembly.

This level of confidence among those colleagues is not gained without some effort. Lawyers are often the target of criticism on the floor of both houses during debate on any legislation that could potentially benefit attorneys. Debate on the repeal of the "Guest Statute" last year often involved direct attacks on attorneys. Legislators argued openly that the bill was a devious attempt by lawyers to line their own pockets. A great deal of confusion

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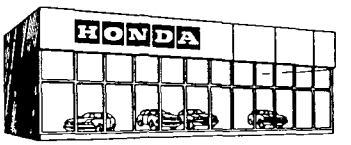

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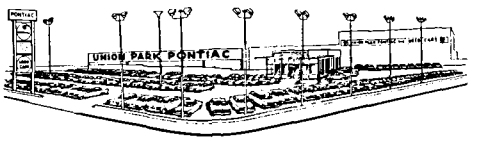

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was created about an otherwise simple piece of legislation in an attempt to defeat it. Not until several legislators in the House had the meaning and intent of the bill explained to them in private were there sufficient votes to pass it. I believe today that even some of the House members who voted for the measure still feel that they voted for a "pro-lawyer" bill, but somehow justified it as a way of repaying a particular attorney who may have been helpful in his or her campaign. Direct attacks on lawyers, their motives, and actions, are not uncommon on the floor of both Houses during the course of debate. As a lawyer/legislator, one must be prepared to reassure the other members that this criticism generally has no basis in fact. Such direct criticism would seldom if ever be directed against another professional group.

A lawyer in elective office must be very careful not to overtly favor or oppose any legislative measure in a way that might be construed as an attempt to benefit attorneys. I served as a House attorney for two years (1975-76) and Senate attorney for five years (1977-81) before I ran for election, and I cannot recall a single legislative measure designed to directly benefit attorneys as a group. Yet the perception still exists that numerous bills contain "secret" or disguised" provisions that will make attorneys great fortunes.

I can think of numerous measures directly benefiting other professional or nonprofessional groups, which sailed through both Houses and were signed into law. The most vivid example that comes to mind is the "Financial Center Development Act." Debate made it clear that this bill would enable financial institutions to realize tremendous profits. Nobody on the floor of either House rebuked the bankers and their representatives as self motivated. That shareholders and management would benefit in a direct financial way by enactment of this legislation was mentioned as an aside and justified by the overall benefit Delaware and Delawareans would receive. An act creating an equivalent benefit for lawyers would never find a place on the agenda of either House. A lawyer/legislator must assure his colleagues that his interest is in the political, and that although he is an attorney by profession, when he steps inside the caucus room, politics—*partisan politics*—is his prime motivation.

If service as a member of the General Assembly does not appeal to you, there is a fourth branch of government of which few of us are aware. It consists exclusively of lawyers. They are the Code Revisors, familiar to us because we occasionally see their names in print in the front of the Delaware Code and the cumulative supplements. They are underpaid and overworked. True lawyers in politics. The Code revisors, Joseph W. Maybee and Daniel F. Wolcott, Jr., are often called upon to tie up the many loose ends left undone after a bill becomes law. Very often they are asked to accomplish the impossible, to see to it that what everyone really meant, although a piece of legislation may not necessarily reflect that intent, is accomplished. Once a bill is drafted, its sponsor is reluctant to amend it. To table a bill for a needed amendment to correct a technical defect in the middle of debate on the bill is considered embarrassing to the sponsor. A sponsor who cannot get things right after much thought, many conferences with interested parties, and drafting by experienced attorneys or legislatively wise bureaucrats, loses face if he must table a bill on the verge of a roll call to dot an i or cross a t. Sometimes, however, the technical error can go to the very heart of the bill itself. A bill some years ago that was merely intended to repeal an archaic section in Title 29 of the Delaware Code, was so cunningly drafted that it had the effect of repealing the entire Title. Imagine Delaware with no State government! The sponsor, anxious to avoid tabling his bill and thereby capitulating to a tenacious and harassing member on the other side of the aisle, announced to members that this was "merely a technical defect, which, I am certain, the Code revisors can remedy." The "Fourth Branch of Government" must then resolve the matter which, of course, it is powerless to do. Joe Maybee recently told me that the Code revisors are very sensitive to the limits of their powers and are always careful not to go beyond them.

On reason may be the provisions of 29 Del. Code § 901(a). This little known provision of the Delaware Code provides that "whoever willfully adds to, alters . . . any act passed by the General Assembly . . . is guilty of a felony and shall be fined not less than $100.00, nor more than $5,000.00, and costs of prosecution, and shall be whipped with not less than 10 nor more than 30 lashes and shall also be imprisoned not less than 1 year nor more than 10 years."

The Codifiers perform a public service for all of us, for which we should all be grateful.

I have decided not to seek another term in the General Assembly because of the time it demands from my law practice. Don't let this cause you to believe, however, that I haven't fully enjoyed my time in Legislative Hall. I have, and I recommend you consider a run yourself. □

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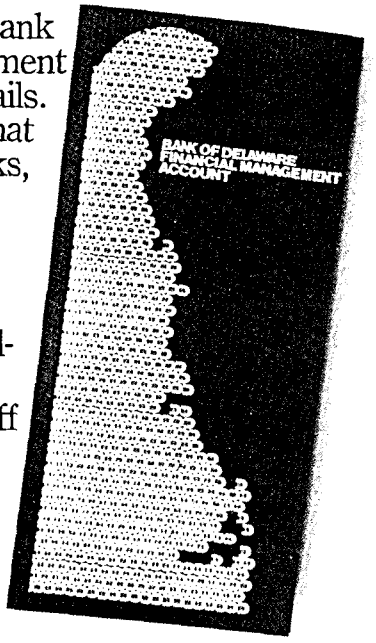

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POLITICAL RESPONSIBILITY— A LAWYER'S OBLIGATION

JOSEPH R. BIDEN, JR.

The intersection between law and politics is unavoidable, proper, and necessary. Lawyers, in a profession dedicated to client service and to the continued good name of the bar, need to maintain the highest standards of ethical and competent practice of that profession. That dictum carries over into political life as well.

The incidence of lawyers *in* politics is well known and often discussed. I will not resist this opportunity to discuss it as well. But the impact of lawyers *on* politics, particularly when "politics" veers over into the realm of the judiciary, is less often considered and perhaps more important. I should like first to discuss the *lawyer as politician*. How does one explain the remarkably high incidence of lawyers in elective office? What qualities of training, disposition, even character, unite the two professions? When does one cease being pure advocate, the Senator as lawyer, and assume the mantle of Senator as leader, with responsibilities to an electorate, to constitutional principles, and to personal ideals? I have no exact answers to any of these questions, but four years as a practicing attorney in Delaware and twelve years in the United States Senate, at least give me a suitable context within which to consider them.

In the second part of this article, I turn my attention to the *lawyer as guardian*, watchdog over the independence of the judiciary and the fundamental principles of our founding fathers. What role can and should lawyers play repelling attacks against either constitutional imperative?

"My only regret is that I have but one law firm to give my country."
Adlai Stevenson, on the Kennedy Administration's use of lawyers from his Chicago office.

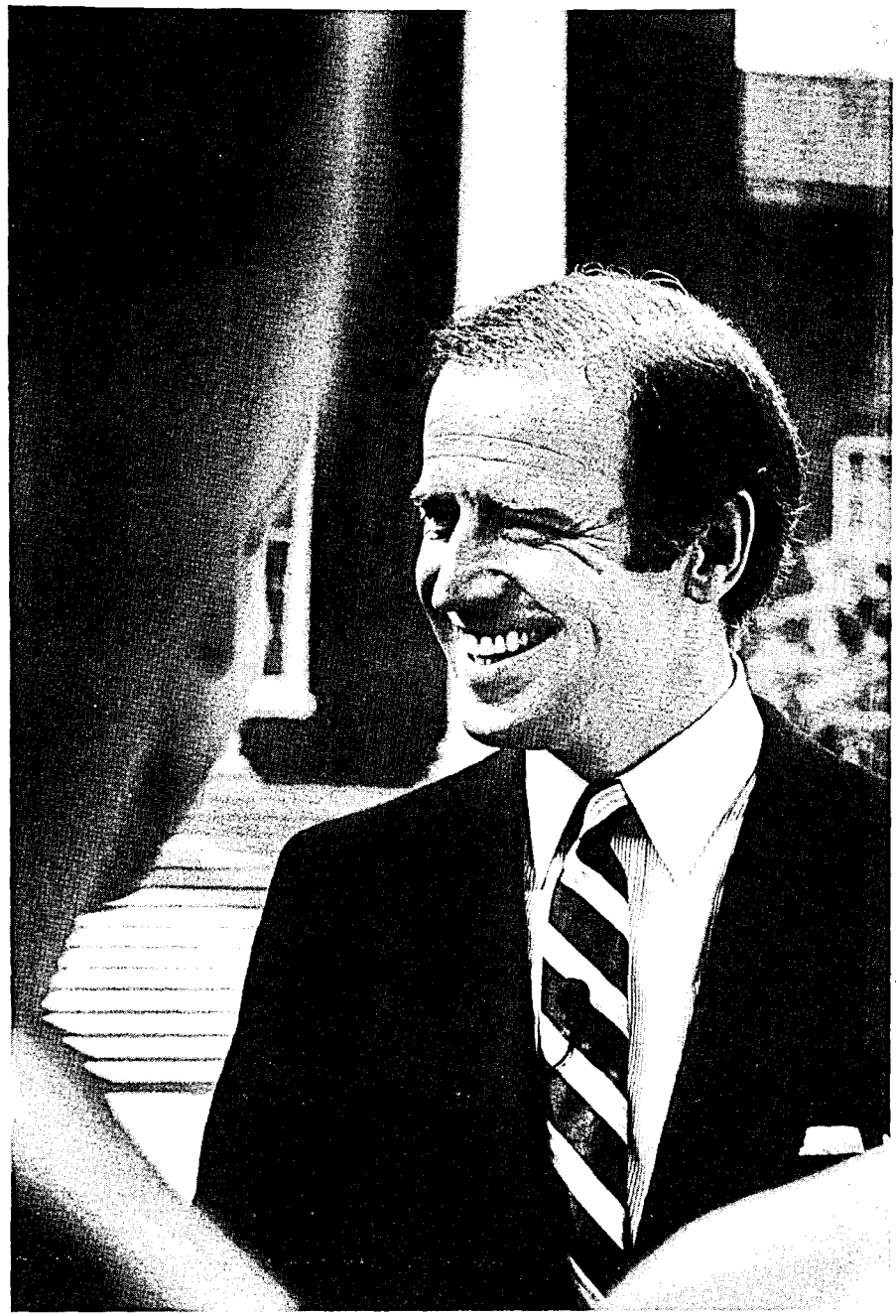
The lawyer in government is ubiquitous. Lawyers operate effectively, in many cases as a majority, at every level of government in this country. They serve in positions that are won by election, by appointment, by tenure, and in some regrettable instances, by virtue of the Peter Principle, which holds that everyone rises

to his own level of incompetence.

Lawyers *interpret* the law, to be sure—the framers secured that role by creating a third branch of government, an arrangement duplicated in every state. In that role, vital to government and to the carrying out of all manner of executive and legislative writs and orders, the lawyer should be closer to a figure out of Plato's *Republic* than to the modern day politician. The Judicial branch, though a key to the balance of governmental affairs, is inevitably political at the time of appointment and ideally apolitical after that. I will return to this theme later.

Lawyers also *make* law in this country, playing major roles in the executive and legislative branches of government. The Stevenson quotation above was no joke—his law firm contributed substantially to the then Administration.

It is no accident that 24 of 39 Presidents have been lawyers, and the Executive branch has been traditionally overpopulated with them. As a consequence, the



That highly popular legislator, Senator Joseph Biden, has served two terms as a member of "the most distinguished club" in the United States of America. This fall he stands for re-election. We have always considered Biden a graceful and eloquent speaker. His article for DELAWARE LAWYER suggests an additional strength: a depth of perception and a discriminating grasp of the subtle differences between a lawyer qua *lawyer and the legislator attorney with a large yet very special clientele. We thank him for this illuminating message.*

gist of Mark Twain's cryptic indictment of the profession, though unfair, is not unrecognizable. In an 1887 letter to a friend he wrote:
"The Departmental interpreters of the laws in Washington . . . can always be depended on to take a reasonably good law and interpret the common sense all out of it."

The influx of lawyers at the legislative level, though slowed somewhat in the years after Watergate, has continued apace with the Executive branch. 60 of my colleagues in the United States Senate are lawyers (among them the chairmen of 12 of the 20 standing committees), as well as 200 of the 435 members of the House of Representatives. This represents the largest single contribution, by far, of any profession to these bodies. State legislatures, though not dominated by the legal profession, still count 1 in 5 members as lawyers.

Like so many of my colleagues, I began my career as a lawyer, working as a public defender in Wilmington fresh out of law school. After four years, I ran for and won the honor to represent the citizens of this state in Washington and changed professions, though not utterly.

The lawyer in government is ubiquitous. Lawyers operate effectively at every level of government in this country. They serve in positions won by election, by appointment, by tenure, and in some regrettable instances, by virtue of the Peter Principle, which holds that everyone rises to his own level of incompetence.

Lawyers become politicians in part because so many of the skills that are taught in law school and in the courtroom prove equally valuable in the courts of public opinion and world leadership. The case is most clearly made where so-called technical skills, both substantive and procedural, are requisite. For example, the law student learns quickly to absorb volumes of material on what to the non-lawyer seem totally unrelated subjects—all in an effort to locate precedent and to form a persuasive argument. Similarly, the ability to assimilate and to evaluate information on a wide variety of subjects is essential to the performance of my responsibilities as a United States Senator. In the 97th Congress, 4334 pieces of legislation were introduced in the Senate; more than 1000 bills and resolutions came before the Judiciary Committee alone, one of four committees on which I serve. The Foreign Relations Committee, another of my assignments, reported out 15 treaties, 17 bills or joint resolutions, 28 concurrent or simple resolutions, and 102 nominations over the course of 144 committee sessions. The workload, never thin, is always varied—the ability to analyze, to present, and to defend a position, taught early in law school is key to effective political leadership.

The like emphasis on procedure in both callings is striking. In the courtroom, the effort to have evidence admitted is often a question of approach: what is the evidence offered to prove, who presents it, etc. On the Senate Judiciary Committee, the majority and minority memberships are about as ideologically far apart as on any Committee in the Senate (you can't know the meaning of the term "locking horns" until you have sat through a hearing with Senators Metzenbaum and Kennedy on one side and Senators Denton, Hatch, and East on the other). As the ranking minority member, I've worked closely with Chairman Strom Thurmond to craft procedural arrangements that have permitted the consideration of important legislation, even when the proponents and opponents in the committee are locked in verbal combat. Absent a member's clear understanding of the procedural possibilities, and the willingness to work with the majority leader on them, nearly all the legislation that comes before the Committee

would end up hostage to the delaying tactics of opponents.

Finally in so far as what I have termed the technical skills, the ability to communicate and to persuade is of the essence of both professions. Early in my career in the Senate, I made it clear that I didn't intend to be just one of 100 who vote. I wanted to be one of the guys who change people's minds. I took some heat for those statements, but I've stood by them. The point is not to follow but to lead, especially when you're certain of your responsibilities and position. I would not be doing my job if I were content merely to vote, and to leave the debating to a few with the energy for it. It *is* possible to change minds on the floor of the United States Senate—sometimes those in the chamber, and sometimes those of a wider public audience. The Senate is a jury, different in some respects, but still a jury, with 99 members instead of 12. The ability to persuade, fueled by litigation experience, can help to crystallize and occasionally to change points of view.

President Kennedy said that "leadership and learning are indispensable". I would add a third essential—the ability to persuade. Without it, learning proceeds in a vacuum and leadership is confined to the converted.

There are of course vast, vast differences between lawyer and legislator. Though law and politics both command service to clients, the very nature of the two clienteles and what they may legitimately demand part company at the outset.

It was my job as a lawyer always to make the best possible argument for my client. I knew exactly who my client was, and what that client needed.

As a Senator, I still have a "client": I am the servant of the people of Delaware and of the national interest. But my duty to my "client" is much more than making the "best argument" in tune with the will of the majority. Churchill said that "a nation will find it very hard to look up to leaders who are keeping their ears to the ground." A leader must take risks, must do more than respond to the will of the majority, and needs to do something other than simply making the best possible argument in response to the demands of a particular client.

Far from serving as a weathervane of public opinion, the essence of a political position is leadership. President Truman said that a "leader has to lead, or otherwise he has no business in politics." That means on occasion taking the kind of risks that separate one from mainstream opinion, from the interests of one set of clients as against many others.

Politics is a risky profession in the same way that law is a relatively secure one. Conflict within the "client" population, and sometimes between one's personal ideals and the wishes of the electorate, can be constant. Unlike the legal profession, a Senator does not simply withdraw from the case or the issue, when these conflicts of interest arise. They have to be identified, evaluated, and resolved every day. If politicians practiced politics the way we were taught to practice law—doing the utmost for each client—the competing masses of client interests would make for a deficit large enough to swallow Mr. Reagan's in one gulp.

In law, we respond to the needs of the client. In politics, we respond to a diverse and frequently contentious clientele. We need to be *responsible* as well as *responsive*, responsible to the public interest, to the national economic health, to the ideals framed in our Constitution and Bill of Rights, and to our personal ideals and vision.

As lawyers, we frequently deal with problems that have become "emergencies", crises that demand outside assistance for resolution. As leaders, dealing with "emergencies" is inevitable, at home and abroad. But our larger obligation is to recognize problems before they reach crisis proportions.

"Lawyers are sleepless sentinels on the ramparts of human liberty, there to sound the alarm whenever an enemy appears."

John W. Davis, President of the New York City Bar Association in 1945, on the 75th anniversary of that organization.

Not every lawyer can or should aspire to politics or to political

GUARDIANS OF COHERENCE

Code revisors Dan Wolcott and Joe Maybee flanked by Phil Lamar and Bill Satterthwaite of the Michie Company, which publishes the Code.

(See A Lawyer-Legislator Assays His role at p. 34 et seq.)

leadership. But there are political issues on which lawyers can play a crucial role, by educating the public and by defending legal and constitutional principles.

The organized bar renders invaluable service in its own right; but when issues, although rooted in law, branch out into the broader world of politics, their solution demands a broader constituency. And these are the occasions for leadership on the part of those to whom the law is both a livelihood and a sacred vocation.

That issues rooted in law sometimes branch out into politics is beyond doubt. Some examples are familiar to all of us.

During the Great Depression, Franklin Delano Roosevelt and his allies in Congress attempted to pack the Supreme Court and to limit the tenure of federal judges—all in the name of hastening solutions to the great economic and social questions of the day. That effort failed, but with a President behind it, it was not easily defeated.

In the 1950s, during a period when red-baiting was in style, Senator Jenner of Indiana led an effort to require loyalty oaths of teachers, lawyers, and government officials. He proposed legislation that was intended to reverse a number of Supreme Court decisions by denying the federal courts jurisdiction over contempt of Congress and over loyalty oaths required by the States. One version of that bill failed passage in the Senate by one vote.

In the early 1970s, liberal dissatisfaction with the *Tatum v. Laird* decision of the Supreme Court resulted in the introduction of legislation that would have removed the court's ability, under Article Three of the Constitution, to determine whether plaintiffs have proper standing to bring a suit in federal court. Fortunately, that bill failed as well, preventing a tide of litigation that would have made the current backlog look like a molehill.

And on the last day that Congress was in session in 1982, the radical right introduced their judicial agenda with a bill that would repeal the incorporation doctrine, federal question jurisdiction, and the exclusionary rule, and which would subject federal judges to a Congressional "star chamber" scrutiny of their records on the bench. The first two of these changes would reverse doctrines that have been central to the operation of the federal judiciary since the end of the last century, and which have been endorsed in opinions by Justices with names like Hughes, Cardozo, Frankfurter, and Harlan. The last aspect of this proposal, the "star chamber", is even more dangerous than the direct election of judges, another favorite proposal of the radical right at odds with the intentions of the founders of this country.

The first three efforts to curtail the separation of powers failed, in no small part because of the efforts of the organized bar in this country. As "guardians" in a very real sense of the principles embodied in the Constitution and the Bill of Rights, lawyers have an obligation to become involved in the political process, when the political process begins to impinge on the independence of the judiciary or the protection of fundamental rights.

When Congress attempts to modify the Constitution or to reduce the independence of the judiciary legislatively, it runs the risk of violating the separation of powers basic to our constitution. This is the notion that Alexander Hamilton had in mind when he described the judiciary in the Federalist Papers as the "bulwark of a limited Constitution", and recent events have borne out his wisdom.

As I pointed out in my speech to the Delaware Bar Association in November of 1982, the independence of the judiciary made possible the important opinions in the *Pentagon Papers* case, in the 1972 Nixon wiretapping case, and in the decision on the release of the Watergate tapes from the Oval office.

In each of these cases, the judicial system met its responsibility to the Constitution, under exceptionally difficult circumstances, by holding that no one—not even in the era of the "imperial Presidency"—can subvert the law and remain beyond the jurisdiction of the courts.

We are all grateful for these examples of judicial wisdom and courage. But if the courts are allowed to become a political arena for partisan or ideological interests, as the bill introduced in 1982 threatened, they will no longer be able to protect the civil liberties and civil rights of all Americans.

It is essential that members of the bar remain vigilant and alert to ideological efforts, from the right or the left, to depart from the intentions of the founding fathers.

Two centuries ago, members of the legal profession played a critical role in drafting and adopting the Declaration of Independence—at great personal risk to themselves. Their society grew logically and morally out of that special understanding.

Similarly today, as members of that same profession based upon the study of law, I believe there is a logical and moral obligation for lawyers to become involved in the political process whenever these principles are threatened. As efforts to end the incorporation doctrine and to subvert the independence of the judiciary proceed, it becomes necessary to go beyond the ordinary practice of law, no matter how ethically and competently it is performed. It may become necessary to make the case before the greater community about protecting the basic liberties threatened by extremist elements in our society.

In the beginning of the Republic, Plato puts into the mouth of his mentor, Socrates, these words—"the discussion is not about any chance question, but about the way we should live." When constitutional and fundamental legal principles are under attack, we are faced with no less a question. □

DISINTERESTED OR JUST INDIFFERENT?

JOHN M. BURRIS

John Burris, challenger in this year's race for the United States Senate, brings formidable legislative achievements to a contest with an equally formidable opponent. Mr. Burris served for six years in the Delaware House of Representatives and was majority leader of the House from 1979 through 1982. He is justifiably proud of his major roles in securing the largest tax cut in the history of the state and as floor leader in the enactment of the Financial Center Development Act, legislation that has brought major benefits to the state. Mr. Burris, a successful businessman, also finds time for charitable and cultural good works, including his efforts on behalf of the United Negro College Fund and membership on the Board of Directors of Delaware Music School.

Two hundred years ago, the founding fathers conceived our bicameral legislative system. A structure which sought to represent the local and national interests, the North and the South, the vocal and the silent. While Hamilton and Jefferson argued about the "legislature", others developed notions of the "legislator".

In the years since, the identity of the legislator vis-a-vis the legislature has become increasingly ill-defined. Today, 62 Senators are attorneys. A scarce few are small businessmen, farmers, educators or members of the other professions that dominated the first Continental Congress. The character of the Senate has changed and the role of lawyers has been greatly expanded.

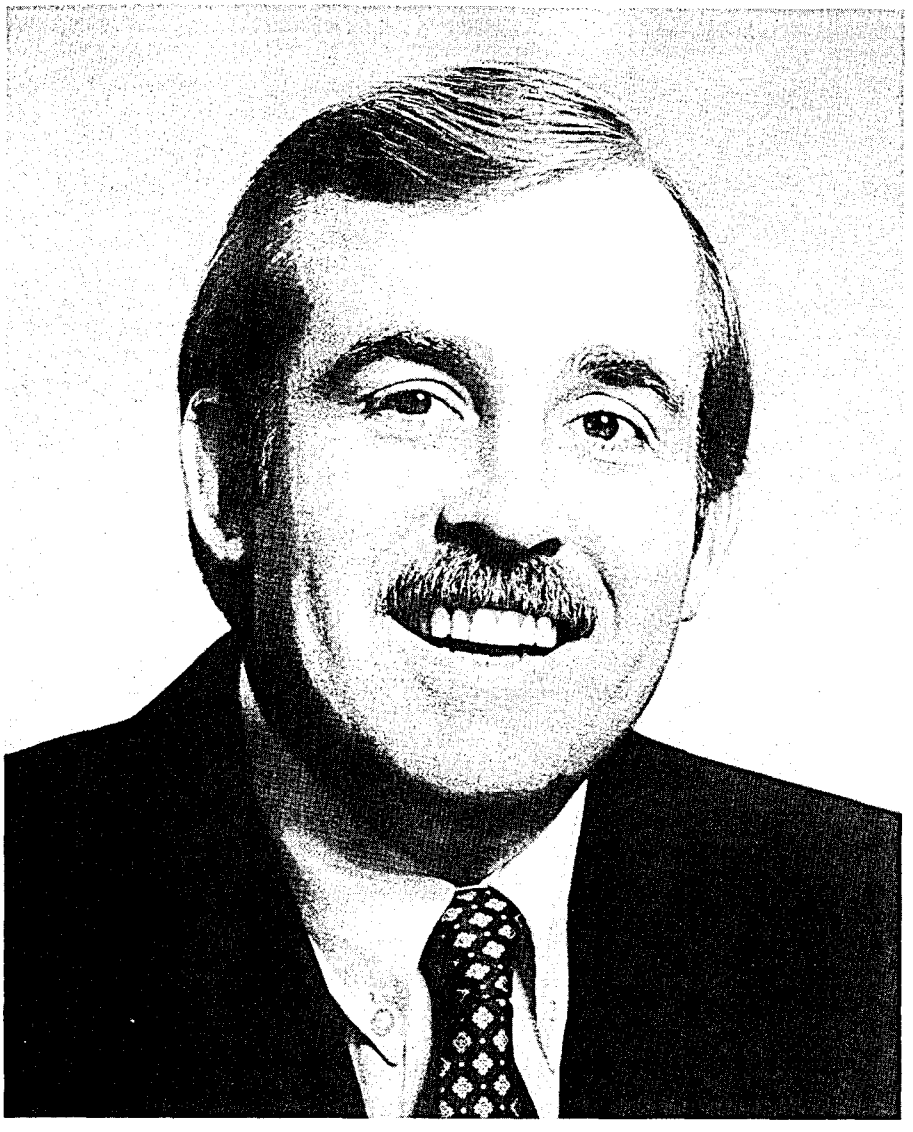
This change has not gone unnoticed. For example, during last year's debate on pay raises for Senators, Senate Majority Leader Howard Baker pleaded for a citizen legislature, which would meet only 6 months out of the year. He argued that members of today's full-time Congress do not serve their function; they no longer express "the desires and the demands and the dissent of the people."

Yet, according to modern historians, a Congress that so closely follows the people's wishes is precisely the type the founding fathers wanted to avoid. In short, sometime between Alexander Hamilton and Howard Baker, the conception of an ideal public servant changed.

Contrary to public opinion and some wrong-headed historians, such founding fathers as Hamilton and Madison believed elected leaders should not express the desires of the people, but act with the best interests of the nation in mind. Their moral ideal was one of *disinterest*, not interest. As Garry Wills's penetrating analysis of *The Federalist Papers* shows, the founding fathers envisioned representative government in a republic as a kind of distillation process. The impure virtue of the people was refined through the election process to produce the nation's disinterested, impartial, and more virtuous leaders.

The checks and balances of our government were designed not so much to control power-lusting leaders as to display their excellences at a time when the "Enlightenment" considered Christian humility antiquated. Similarly, representatives were elected from districts, not so that they might represent the district's local interests, but with the hope that a small community's pride would encourage the election of righteous men. Instead of expressing "the demands and the desires of the people," the ideal representatives of the founding fathers expressed public virtue; they acted with the best interests of the nation in mind. At some point in our nation's past, Hamilton's disinterested leader became Baker's merely indifferent one.

In all fairness to Baker and other Twentieth Century leaders, my last statement is somewhat an exaggeration. The enlightened eighteenth century ideal of disinterest still haunts public discussion. In fact, it played a key role in the very same discussion that provoked Senator Baker's remarks. A part of the debate concerned the limitation on outside income



for Senators.

The origin of this rule, no doubt, is the belief that Senators should be impartial, that they are elected to serve the interests of the nation and not, what *The Federalist Papers* calls "factious" interests. Baker himself qualifies his plea for a citizen legislature with the statement that, "of course, there would have to be stern and very stringent conflict of interest laws."

Baker's plea for more sensitive leaders is only one side of a debate that reflects two conflicting ideals of leadership. The most obvious result of this conflict is a no-win situation for our leaders. Either they are disinterested, but out of touch with the people, or they are sensitive to the needs of their constituents, but inattentive to the best interests of the nation.

What is more important is that the debate reflects two very different conceptions of human nature. One views man as basically virtuous; given the refinement of education, he can act in the interests of the entire community. The other conception sees man as hopelessly driven by low desires for wealth and power.

Those who call for more sensitive leaders who better express the people's desires fall into the second category. They have given up hope for truly impartial men. They believe the majority of men to be driven by greed and a lust for power.

The best they can hope for is a system of government that allows for the expression of all competing interests, with the belief that the outcome of this clash of interests is equitable because it reflects everyone's desires. According to this view, the best leaders are those who most faithfully represent the interests of their constituency.

On the other hand, those who, like the founding fathers, believe man is virtuous would insulate leaders from particular passions and interests in order to cultivate an impartial view. They do not want leaders who simply represent special interests, but leaders who can forget their prejudices and act in the best interests of the nation. Men of this persuasion have not given up hope that leaders can and should act impartially.

Obviously, Baker's call for more sensitive legislators does not assume this more enlightened view of human nature. However, his call for "stringent" conflict-of-interest laws does point toward the possibility of a truly impartial leader.

Yet, the very fact that Baker and others see the need for laws to create this impartiality betrays their mistrust of a man's ability to act truly in the best interests of the nation.

Baker's misinterpretation of the intent of the founding fathers demonstrates his (and probably most of our leaders') belief that men are driven by greed and lust for power. With Watergate, Abscam, and the other scandals that have plagued Washington in the past few years, we can hardly say the assumption is baseless.

But perhaps Baker and his colleagues might do well to heed the advice of one of the thinkers most influential among the founding fathers, David Hume. For Hume, the reality of a man was in part the product of his self opinion. In an essay on national character, he noted Caesar's tenth legion which was collected indiscriminately, but "having once entertained a notion that they were the best troops in the service, this very opinion really made them such." □

THE NEW LAWYER-POLITICIANS

JOSEPH WEIK

This is Joe Weik's second appearance as a contributor to DELAWARE LAWYER. (His model summary of the infelicities of the Tybout's Corner landfill graced our Fall-Winter 1983 issue.) It is an editor's delight to have a journalistic resource such as Joe. Not surprisingly, he has been appointed to the Publications Committee of the Delaware State Bar Association. Welcome back, Joe!

Despite the scandals of Watergate and Abscam, which greatly tarnished the public image of lawyers and politicians alike, there are still attorneys who will continue to sacrifice their private lives by entering public service at every level of government. In Delaware, we have lawyer-politicians who govern us through the offices of United States Senator, Governor, and Attorney General. Over the years, however, few, if any, attorneys have been willing to make the sacrifice to become state or local legislators.

As of this writing, two young attorneys, Ralph K. "Dirk" Durstein, III and Theopalis "Theo" Gregory, are running for seats on the Wilmington City Council. Both are involved in a primary race for the City Council at-large district. There are three open seats in the Democratic primary and none of the incumbents have announced their intention to reclaim their offices. It appears that Dirk and Theo are the only lawyers who have announced their candidacies in the upcoming City Council elections.

Since so few attorneys are willing to serve as state or local legislators, it is difficult to objectively assess whether or not an attorney is better qualified to serve in a legislative body. Historically, society has recognized that an attorney's training and expertise would better qualify him to serve in public office. Over two thousand years ago, Roman statesman, orator, and author, Cicero, commented on the need for legal training among Roman senators.

As Cicero put it, "It is necessary for a Senator to be thoroughly aquainted with the constitution; and this is a knowledge of the most extensive nature; a matter of science, of diligence, of reflection, without which no Senator can possibly be fit for his office". The long list of attorney-politicians who have served this country at national, state, and local levels would support Cicero's comments and add credence to the view that a legal education makes one better qualified to serve in the executive or legislative branches of government.

Assuming that attorneys are better qualified to serve in public office, why are so few attorneys willing to commit themselves to serve in the state and local legislative bodies? Both Dirk Durstein and Theo Gregory have their own ideas as to why more attorneys are not involved in the political process. While both would agree that many lawyers are willing to devote time and money to work on political campaigns, they are usually reluctant to actually run for office. Dirk feels that most attorneys just don't have the time that is necessary to serve as a state or local legislator. Even though Wilmington City Council only meets on Thursday nights, there is still a substantial time commitment that must be made in order to attend weekly committee meetings and other administrative hearings. There are also numerous meetings with various

neighborhood groups who are actively involved in community affairs. Groups such as the Forty Acres Association, Haines Park Association, and the Highlands Association, belong to a group of approximately fifty city-wide neighborhood organizations who confront their councilmen with such neighborhood problems as vacant homes, crime, noisy neighbors, traffic control devices, and other issues peculiar to each neighborhood through the city. Every city councilman recognizes the need to be aware of these problems and frequently devotes time to personally inspect the situation and listen to constituent complaints. Such an enormous time commitment makes the job of city councilman more than just "part-time". Even though councilmen's salaries will be increased to $12,000 a year as of January 1, 1985, it is still insufficient to compete with the fees an attorney could earn in private practice.

In addition to the enormous time commitment, Theo Gregory voiced concern about the possibility of adverse publicity that could accompany an unpopular choice or decision made by a city councilman. Theo felt that most attorneys tend to shy away from adverse publicity, and as Theo put it, "No one wants to be in Ralph Moyed's next article".

Despite the time commitment, low pay, and possibility of being held up to public scrutiny and criticism, both Dirk and Theo are enthusiastic about the possibility of serving on city council and hope to bring the expertise and knowledge they have acquired as attorneys to the City Council chambers. In addition to being attorneys, both candidates are former prosecutors. Durstein served in the Criminal Division of the Department of Justice, while Gregory was an Assistant United States Attorney. Both feel their experience as criminal prosecutors is a definite advantage in their campaign. Theo believes this will help him make "tough decisions in a fair-minded way".

Before announcing their candidacy for Wilmington City Council, neither Gregory nor Durstein had ever run for political office. Both, however, have exposure to politics

through their associations with politically active groups. Gregory has been active with the Inter-Neighborhood Foundation, which is interested in developing low and moderate income housing, as well as neighborhood beautification within the city. Durstein has been involved with the national Common Cause organization, which has been instrumental in such legislation as the Campaign Finance Law, Sunshine Law, and the Lobbyists Registration and Financial Disclosure Acts. Durstein's credentials for public service include Chairmanship of the Board of Directors of Community Legal Aid Society, Inc. a principal source of legal services to the disadvantaged.

While it is impossible to predict what the future holds for the political careers of these two new lawyer-politicians, it is obvious that they both have diverted time from their private law practices in order to bring their special talents into the political arena. Their fellow members of the Bar should be proud that such bright young attorneys are willing to actively engage in politics, a system indispensable to the needs of all. We can only hope that they, and the other attorney-politicians who are running for office this fall, bring back the lustre to the status of the attorney-politician, so badly tarnished by the political events of the last few years. As Joseph Addison, the English essayist and poet, once remarked, "Few consider how much we are indebted to government, because few can represent how wretched mankind would be without it." □

Postscript: Joe's article was written well before the September 8 primary. As we know now, Theo prevailed after a vote-counting cliff hanger. Dirk did not prevail, though he did very well for a first time venture into the political whirlpool. We certainly hope that he will bring his fine qualifications before the voters again. The profession should encourage and applaud the dedication and commitment to public service these two young lawyers have shown. We shall watch their future contributions with the greatest interest. *The Editors.*

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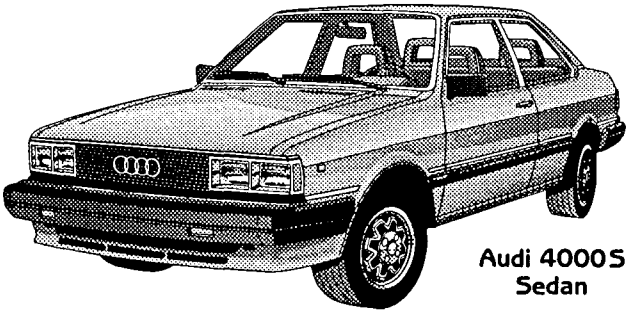

Audi 4000S
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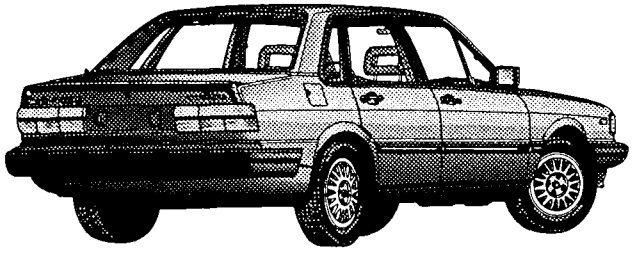

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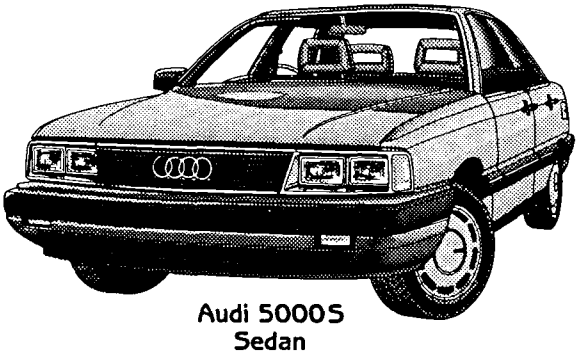

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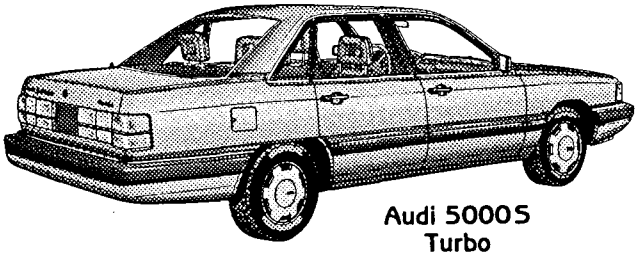

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H. MURRAY SAWYER, JR.

Murray Sawyer is an increasingly prominent trial lawyer engaged in a general practice in Wilmington. (He and his partner Roger Akin recently conducted a successful defense of a group of policemen charged with civil wrongs by the celebrated Father Bernard Pagano.) For two years Murray served on the New Castle County Council, thereby grafting political wisdom onto legal acumen. His pleasant light wit and engaging personality have made him a decidedly popular public speaker. A lot of that creeps through in Murray's account.

The following is a lighthearted remembrance of the summer primary campaign of 1980 when I sought the Republican nomination for the New Castle County Council seat from the Third District. Comments about my years in office had best be deferred until a later time.

Late one afternoon in May, 1980, Mike Harkins called me with a legal question about campaign contributions for a fund raiser to be held for Mike Castle, who was then running for Lieutenant Governor. Harkins was the Republicans' boy wonder, a rotund, Irish Catholic politician of exceptional skill and cunning. Our paths had crossed two years earlier when I had served as Rich Gebelein's Treasurer during his successful run for Attorney General.

I answered Mike's question. At the end of that conversation, and almost as if it were an afterthought, Harkins asked if I would have any interest in running for a seat on the New Castle County Council. He told me the district was heavily Republican, that victory was thereby assured, and that no campaigning effort would be required. In typical "Harkinsese", Mike said I would have to do "no windows and no heavy lifting".

I had long been fascinated by politics. Before Harkins's call came, I had been asked to run for local and statewide offices, but I had declined. Now the timing seemed better. I told Mike I would think seriously about running.

Two days later Dave Swayze, then Governor duPont's Executive Assistant, called to ask if I could join a tennis foursome including Bill Manning and Jim Gilliam. (Jim was a former Cabinet Secretary and Bill was the Governor's legal counsel.) As we drove back from the tennis courts Dave mentioned in an off-hand manner that Tom Sandbach, an energetic lawyer who had served as counsel to the Republicans in the General Assembly, was also interested in running for Council.

I told Dave that I had no interest in running in a primary. A primary would not be good for the Republicans of that district. Dave assured me that Tom would change his mind.

That was Memorial Day Weekend. It was a *critical* weekend. My wife Randy had graduated from the University of Delaware after seven years of part-time attendance required to complete her interrupted college education. We had planned a large cocktail party for Monday to celebrate her very determined effort. That Saturday we weeded the garden and talked about my potential candid-

acy. Randy gave her blessing.

On Monday at the height of the cocktail party Rick Collins, who was running for County Executive, called me and asked me to run with him. I expressed concern about a primary. Rick assured me that he and Harkins were satisfied Tom would not run. With this assurance, I said yes.

I'M A CANDIDATE: "NOW WHAT DO I DO?"

It soon appeared that those assurances were unavailing. Tom was determined to place his candidacy before the Republican electorate. Consequently, Harkins advised me to call a press conference and announce *my* candidacy at once. Although I had never held a press conference and knew nothing of its mechanics, I jumped in head first. I prepared a statement, notified the media, and went to Republican headquarters, ready to meet the public. No one from the media appeared.

I was mortified. It reminded me of the question posed by anti-war activitists during Vietnam: "What if they gave a war and nobody came?"

Those two experienced politicos, Rick Collins and Lois Parke (the retiring incumbent) then decided that if the mountain would not come to Muhammed, then by God Muhammed would come to the mountain. We jumped into Rick's car and drove frantically to the Channel 12 studios where I announced my candidacy, and then went to the News Journal papers where I did the same.

POLITICAL MUSCLE "PUMPS IRON"

We did not dissuade Tom. Determined to run, he indeed announced his candidacy the day after I announced mine. The difference between us was that Tom was an experienced political insider. I was the new kid on the block, and knew nothing of political infighting. I had not been an active party person and had no interest at that time in backroom dealings. I continued to remind Harkins of his "no windows, no heavy lifting" statement. He assured me that his Republican muscle would move Tom out of the way.

He and Collins set out to persuade the Republican Committee in Wilmington to endorse me. Mike called me a week after my announcement to advise me that my endorsement was a certainty.

Out of an abundance of caution Harkins told me to speak with each Committee member in preparation for a joint meeting at which the city committee would give its endorsement decision.

One committee member, Tom Cushing, a duPont company lawyer, assured me during a thirty minute conversation that he would give Tom and me a fair hearing and that he would make no decision until he had heard us. The next night I appeared at Republican headquarters to present my case to the Committee members. Tom did the same. As I concluded my remarks that fair-minded duPont lawyer opened a notebook, and proceeded to read a lengthy prepared statement in support of Tom.

Tom and I left the room, the committee voted, and then advised us that they had unanimously endorsed Sandbach. So much for Harkins's body building.

With that significant political muscle flexing, Rick and Mike decided that they should then next have me "pump iron" without their help. I attempted to do so. The barbells proved heavy.

There remained another significant Republican district, the old 13th, which covered most of the "Chateau country." The district Committee met at an eighteenth century tavern where Tom and I were invited to speak. Because I was a political novice, Collins also spoke in my support, and Harkins agreed to work behind the scenes to secure my endorsement.

Phil Beardsley and I stood at the entrance to Buckley's to hand out campaign literature that had literally "come off the press" less than two hours before. Tom, Rick, and I then spoke on this very warm June evening to the members. We retired. The committee voted. By a scant margin of one vote Sawyer, with a little help from his friends, won the endorsement of the Chateau district Republicans, 12-11.

With that ringing endorsement, my campaign was saved from certain extinction.

BLUE BUTTONS AND BLUE MOVIES

The next day I walked into the county offices of Lois Parke to find out just what a candidate does when running for elective office. Lois smiled benignly. She asked if I knew where to place my campaign button on my coat. Mike Ratchford, then a Harkins assistant and now the campaign director for Mike Castle, had secured a huge, six inch Carolina blue button announcing to the whole world that I was Murray Sawyer and that I was running for County Council.

That button embarrassed me no end.

Lois advised me that not only must I wear it at all times, but also that I must wear it on my right lapel for best visibility: hereafter when I campaigned that button must remain glued to my shirt or coat.

I made my first campaign appearance at the July 4th picnic held in Deerhurst, where we had lived for two years after I returned from law school. We hadn't been back for seven years. A good friend, Jackie Blake, made the arrangements. As I placed that button on my shirt, my face turned bright red. Nevertheless I persevered and went around greeting as many people as possible.

As the picnic drew to a close, the remaining six people were gathered in a circle. I addressed them. Two appeared to fall asleep. The other four — all children — eyed the jungle gym behind me with obviously greater interest then they received my speech.

Knowing that campaigns and candidates are ever on the go, I rushed from that ringing success to Centerville to another July 4th picnic. This was a concert. As I got out of my car, the embarrassment of my button proved too much. Surreptitiously looking around to make certain Lois was not there, I removed it, placed it in my pocket, and sat down to enjoy the concert with no electioneering whatsoever.

You may recall the joke about the three blind men, one of whom feels the sides, the next the ears, and the third the trunk of an elephant. They then describe the elephant in three distinct ways.

So it was then as three political novices and I sat around my dining room table in early July trying to devise a campaign strategy when we didn't even know how to run a campaign.

We initially identified the size of the councilmanic district. To my amazement, it contained 65,000 people. It was large enough to hold all or portions of 12 state representative districts and six state senatorial districts. It included 49 election districts. The Third District stretched from the eastern side of Concord Pike to a region beyond the western side of Lancaster Pike. It ran from downtown Wilmington and to the Pennsylvania line.

A campaign committee was formed. We divided the committee along task orientations. Bill Manning came on board as the sage and wise political director and counselor. Walt McEvilly took on the responsibility for scheduling neighborhood parties. (This was an idea not unlike that adopted by Elise duPont in her campaign this year for Congress.) Rich Levin undertook to coordinate matters for me in the Brandywine Hundred area. Tom Whittington became, in his words, the "kick ass and take names" guy for the campaign. Jim Tyler became our campaign coordinator and overseer. Norris Wright took on the thankless tasks of a Campaign Treasurer.

In addition to that legal fraternity, the steering committee was likewise composed of men and women who were extraordinarily gifted and hard working. With the committee members in place, we adopted a strategy of door-to-door and neighborhood meetings.

At one house in Alapocas, a smiling middle-aged man came to the screen door and opened it. When he heard I was a political candidate he shut the door and backed up into the nether reaches of the darkened hallway, looking at me as if I were the bearer of a social disease.

My long hot summer began.

From the first of July through the end of August, I would leave the office every afternoon at lunch time. For the rest of the afternoon and evening I would make my rounds of the Third. Saturdays and Sundays were the same routine but with longer hours. With a clipboard in hand to identify voters and with political handouts in both pockets, I went from development to development, house to house, and person to person selling my candidacy.

When you run for county council, you do not have to address the issues of nuclear war, race relations, or the federal deficit. Indeed, I found that I invariably got a blank stare when I brightly announced that I was running for county council. As a consequence I learned that if I could develop a 30 second spiel, that regardless of what I said, people who new nothing of county government would be happy with that recitation.

And I soon discovered that handing out political literature at the doorsteps of homes in Wilmington was basically the same as selling dictionaries at the doorsteps of homes in Cleveland, Ohio, as I had done during one college summer. The only difference was that some of the homes in Delaware contained Democrats and Independents who did not yearn for Republican rap-tap-tappings on their doors.

At one house in Alapocas, a smiling middle-aged man came to the screen door and opened it. When he heard I was a political candidate he shut the door and backed up into the nether reaches of the darkened hallway, looking at me as if I were the bearer of a social disease. For all I know it might have been my Carolina blue button. (He probably went to Duke or North Carolina State).

And speaking of Carolina blue, the color had been chosen by me in recognition of my college alma mater. The signs, the handouts, and all the literature were supposed to be that color. Unfortunately, the printer was unaware of the fierce rivalry between graduates of UNC and those of its nearby neighbor, Duke. Consequently, when my political material was returned to me in a dark or "Duke" blue, rather than in a light or "Carolina" blue, the printer got an angry, emotional reaction from a highly offended candidate.

The neighborhood parties I attended in the evenings had a style and rhythm of their own. Generally 15 to 30 neighbors would attend an evening gathering. I would arrive 15 minutes in advance with the roll of stick-ons, bumper stickers, and handouts.

I established a pattern and began to polish my performance. After small talk for half an hour, I would give a short speech and answer questions. On my maiden voyage in Tavistock, a suburban questioner wanted to know why Wilmington charged him and his neighbors double what it charged its own residents for the same water. I was dumbfounded. I didn't even know that Wilmington supplied water to the suburbs and I had no idea that it doubled its charges beyond city limits. There was no rational reason for this, but I learned that there were excellent *political* reasons.

I recall another meeting in Brandywine Hundred late in the campaign when instead of 20 or 25 in attendance there were four. For two hours, the four of us spoke about everything under the sun, including the adult movie house in Newark, which wasn't even in my district. I took the popular position against such pornographic places, only to learn two days later that the owner of that theater and his wife had been half my audience.

THE DOG DAYS OF SUMMER, OR "WHERE IS MY COMMITTEE?"

As any candidate who has run for office knows only too well, there comes a time in every campaign when despair sets in, a dread certainty that defeat is inevitable.

This happened to me three weeks before the primary. I felt an irrational, unfounded fear that my campaign committee members were not working for me, that the opposition had an extremely well managed campaign, and that I was knocking on locked doors and playing to empty theaters.

I decided to go down to the Trolley Square headquarters of the Republican master political consultant, Mike Harkins. I told him of my frustrations. The campaign literature was late, the color was wrong, my committee members were on vacation, the sun was too damned hot every afternoon, and I was losing money from the practice of law while I engaged in this "no heavy lifting and no windows" activity. To his everlasting credit Mike accepted responsibility for my misunderstanding of the campaign. But he offered no solace other than to say that I should get back on the streets and get back to work. And I did.

Mike reminded me of The Kid Glenn. Every campaign has one. The Kid Glenn was twelve years old. The son of Babs Coleman, he was the best politician of our entire group. He was enthusiastic, energetic, and optimistic. Glenn went everywhere with me. He knocked on doors, stuffed envelopes, and made calls. I hope he never loses that enthusiasm. He was an inspiration to our campaign committee. I left Harkins's office much cheered.

PRIMARY

On the day of the vote Bill Manning's son, Nathan, was our poll watcher at Brandywine High School. Nathan did a great job in insuring that the proper people registered and voted for me. Nathan was eight.

In the City of Wilmington at Immanuel Church on 17th Street, Vincent Watchorn secured Sawyer votes. He was ten.

Six people were gathered in a circle. I addressed them. Two appeared to fall asleep. The other four – all children – eyed the jungle gym behind me with obviously greater interest than they they received my speech.

I did better at the Alexis I. Junior High School on the Kennett Pike. There I had two poll watchers, my daughter, Ann, and her friend, Lee Leonard. They were twelve.

I spent primary day at Harkins's direction, running from one polling place to another. I knew how an actor controlled by a director must feel. My life was not my own. Nevertheless I smiled, handed out literature, kept that big button in view, and tried not to let any voters see the sweat of my brow.

Randy had ordered a six foot submarine sandwich for refreshment while we awaited the results of the voting. We didn't know whether that sub would be eaten in the quiet solitude of defeat or shared in joyous celebration of victory. They say victory has many fathers while defeat is an orphan. That night our house filled with both friends and people we had never seen before. I was not orphaned.

The campaign primary was over. It was then that I understood an absolute truth: no campaign is ever won through the efforts of any one person. My campaign committee had worked tirelessly and with enthusiasm that was hard to imagine. They had been in my law offices nights until midnight to send out mailers, they had joined me in parties throughout the neighborhoods, they had campaigned individually for me, they had assisted in fund raising. They had been my solace and my backbone. I had met with them weekly for immeasurable guidance and support.

LESSONS LEARNED AND LESSONS APPLIED

I look back at that summer of 1980 with a great fondness, even joy, in appreciation for the capable effort made by a number of able people. A common goal achieved brings rarely equaled satisfaction. We had started out scarcely three months before with no idea of how to go about getting elected. Our goal was accomplished. And in that effort and striving, friendships had been made which would last for years, joys and defeats had been experienced by the group jointly, and there had been tremendous emotional highs and lows.

I found myself the Republican candidate to represent 65,000 people in local government.

I further discovered that if the law is a jealous mistress then politics is but an equally jealous lover. For two years I delicately tried to balance the responsibilities of maintaining an active practice of law with service to constituents, problem solving, and policy making. The political responsibilities continued to increase, the challenges to mount. Ultimately it became clear that I could not do both well at the same time. I regretfully concluded that elective office for me would have to end with my term on council. And so I retired from elective office. No matter what happens in the future, I shall always have the sustaining memories of the joy and fun of those years. It all began the summer of 1980. "No heavy lifting and no windows." A goodly untruth. In retrospect I enjoy the exercise. □

DELAWARE'S FIRST LAWYER- GOVERNOR THOMAS MCKEAN

In the previous issue of DELAWARE LAWYER, we published a review of Senator Roger Martin's **A History of Delaware Through Its Governors.** *Senator Martin has graciously permitted us to reprint a passage, a biography of Delaware's first lawyer-governor. As you will see from Senator Martin's account, Thomas McKean had a judicial career as well as an executive one, and his career in political service straddled the state of Delaware and the Commonwealth of Pennsylvania.*

ROGER A. MARTIN

Son of Scotch-Irish parents, William and Letitia Finney McKean (pronounced McCain), Thomas was born in New London, Chester County, Pennsylvania, on March 19, 1734, just 4 miles north of Newark, Delaware, along what is present day Route 896. His father was an unseccessful tavern owner, who, nonetheless (perhaps through his mother's family) came into some 400 acres of Chester County land when the average holding was about 130. Perhaps this legacy permitted him to see to it that Thomas and his brother Robert were educated in the noted Reverend Francis Alison's nearby school.

When he was 16 Thomas went to New Castle to read law with his cousin David Finney. Four years later he was admitted to the bar in Sussex County and two years after that he was made deputy prosecuting attorney in the same county. He was later admitted to practice law in absentia at London's famous Middle Temple. There followed an impressive list of accomplishments in law and politics and the accumulation of wealth. By the mid-1760's McKean, along with George Read, Alexander Porter, Nicholas Van Dyke, and David Thompson, was getting most of the law business in New Castle. His popularity with his clients was difficult to understand. He seldom mixed with people except on public occasions. Many people found his company insufferable.

Still others concluded that he attracted so much business because people simply had confidence in his integrity and his impressive credentials.

His political career began when he was elected Clerk of the Assembly of the Lower Three Counties Upon Delaware in 1758. In 1763 he was elected a representative from New Castle County to that body and served until 1776. In 1765, when he was one of the three delegates from Delaware to the Stamp Act Congress in New York, McKean was so outspoken in his attitude toward the Crown and the timidity of some of the delegates that he got into trouble. President Timothy Ruggles challenged him to a duel, but McKean left New York before dawn the next day. Coming back through New Jersey, McKean chided the delegate to the Congress from that state to the point that the latter offered yet another duel, but nothing came of that either. In 1774 McKean was elected to the Continental Congress and every year thereafter (except one) until 1782.

By now McKean was a family man. In 1763 he had married Mary Borden of Bordentown, New Jersey. Her father, Joseph, owned a boat and stage line operating from Philadelphia to New Jersey. Much of McKean's wealth in land came after his marriage. Children born to them were Joseph (1764-1826); Robert (1766-1802); Elizabeth (1767-1811); Letitia (1769-1845); Mary (1771-1781); Anne (1773-1804). Two weeks after Anne's birth McKean's wife died and was buried near the side door of Immanuel Church in New Castle. This was one of the rare moments when McKean exhibited emotion in public.

In September, 1774, McKean married Sarah Armitage of New Castle. From this second marriage came a son who was born and died on the same day on November 1, 1775. Four other children followed: Sarah (1777-1841); Thomas, Jr. (1779-1852); Sophia (1783-1819); and Maria (1785-1788). Sarah, renowned for her exceptional beauty, later married Don Carlos Martinez de Yrujo. Their son became a Prime Minister of Spain.

Many people found McKean insufferable. Still others concluded that he attracted so much business because people simply had confidence in his integrity and his impressive credentials.

On July 1, 1776, it was McKean who sent the messenger for Caesar Rodney to come back from Dover to Philadelphia and vote on Independence. George Read's "no" vote caught McKean by surprise, and certainly Rodney hadn't expected it, for he was home attending to state business.

When the convention took place in Delaware to organize the first state government in 1776, it was dominated by conservatives. McKean, probably bacause he was from New Castle County, managed to have a part as Speaker of the House in the 1st General Assembly. Rodney, from Kent, was not so lucky.

Throughout the Spring and Summer of 1777 McKean kept his wife with relatives at Newark to await the birth of Sarah on July 8th. He stayed in the vicinity until August 15, ten days before the landing of Howe in the Elk River. Less than a month later McKean suddenly became acting governor when the British captured the first Governor of Delaware, McKinley, and imprisoned him. Ordinarily, Read as Speaker of the Senate would have become the interim governor, but he was away in Philadelphia as delegate to the Continental Congress. As this was the one year McKean was not a member of the Congress, he was available and, according to the 1776 Constitution, the Speaker of the House was next in line.

On October 1, Acting Governor McKean had the state elections in New Castle County changed from New Castle to Newark because of the proximity of the British, who by now were moving on to Philadelphia to occupy that city. No one was elected in Sussex because of riots on election day. Generally the more radical Whigs dominated the 2nd General Assembly, probably because the enemy was so near. McKean appointed Caesar Rodney as Major General of State Militia and John Dagworthy, Samuel Patterson, and John Dickinson as brigadiers, though the latter declined. In addition, McKean made a futile attempt to raise troops for the cause.

It wasn't long before McKean was writing George Read, begging him to come home and assume the acting governor's chair. He was literally exhausted. The responsibilities of the many offices he held were too much. Though he had established residence in Philadelphia, McKean was still very active in Delaware. Aside from being a member of the General Assembly of Delaware and Acting Governor of Delaware, he was Chief Justice of Pennsylvania at the same time.

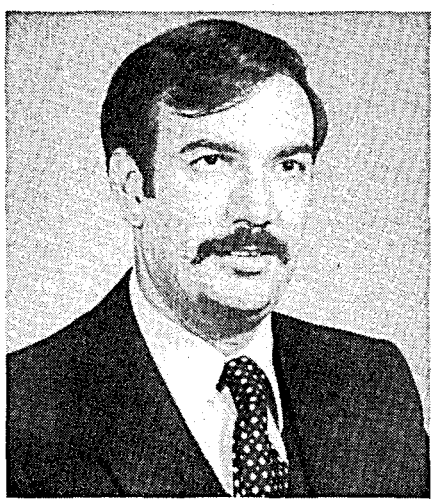
During the Revolution McKean was a Signer from Delaware to the Articles of Confederation. In 1780 he occupied a mansion on the northeast corner of 3rd and Pine Streets in Philadelphia. In 1799 he retired as Chief Justice of Pennsylvania. He became Governor of that state in 1808. He eventually became a Jeffersonian Republican. Some say he could have been Vice-President of the United States, but at age 69 he declined the nomination.

Over six feet tall, and always well-dressed, McKean wore a large cocked hat and carried a gold-headed cane. He could be given to quick temper and was known as a speaker rather than a writer. Toward the end of his life his landed wealth amounted to about 10,000 acres in the Delaware Valley. On June 24, 1817 McKean died at the age of 83 and was buried in the First Presbyterian Church Cemetery in Philadelphia. Sarah, his wife, died on May 8, 1820. In 1843 McKean's body was reinterred in Laurel Hill Cemetery in Philadelphia overlooking the Schuykill River. His tombstone makes no mention of his association with the State of Delaware. □

"A History of Delaware Through Its Governors, 1776-1984" can be obtained for $20, plus $3 handling, by application to the author at 13 Pinedale Road, Newark, DE 19711.

THE NEW DUI LAW: ITS VIOLATION OF YOUR RIGHTS WILL DRIVE YOU TO DRINK

LOUIS B. FERRARA



Lou Ferrara, a graduate of the University of Delaware and Dickinson Law School, has engaged in private practice since his admission to the Bar in 1972. As you can see from his article, Lou does a great deal of defense work in drunk driving cases. Primarily a trial lawyer, he also handles many personal injury cases on the civil side. Lou recently secured a jury verdict in the amount of one million dollars for two plaintiffs injured in a motor vehicle accident. It is quite possibly a record verdict for this sort of case in the local United States District Court, where it was tried.

No statute in recent memory has caused so much controversy, prompted so many letters to editors, so polarized proponents and opponents, and led to the arrest of so many as Delaware's new drunk driving law, enacted on October 19, 1982 and reenacted on February 18, 1983. The most controversial sections of the new law are the provisions for issuing temporary licenses, the requirement of administrative hearings to retain driving privileges, and the sly encouragement it gives to sharp police practice in coercing suspects to submit to intoxilyzer tests.

Under the previous law, before a chemical test could be administered, the police officer requesting it had to inform the subject of his right not to take the test and the consequences of a refusal. That recital, commonly referred to as the "implied consent form", read as follows:

"I have reason to believe that you have violated Section 4177 of the Motor Vehicle Laws of Delaware by driving, operating or having actual physical control of a motor vehicle while under the influence of intoxicating beverages. You are now under arrest for that violation. I request that you submit to the taking of samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood. If you refuse to submit to the test a report of your refusal will be forwarded to the Motor Vehicle Commissioner who will revoke your license and/or privilege to drive a motor vehicle within this State for a period of one year."

Title 21 *Delaware Code* §2742 entitled *"Revocation; Notice; Hearing"* now provides in subsection (a) that if you refuse to permit a chemical test *after being informed of the penalty of revocation* for such refusal, the test shall not be given. However the section goes on to state that "the police officer may take reasonable steps to conduct such chemical testing even without the consent of the person if he seeks to conduct such tests without informing the person of the penalty of revocation for such refusal . . . ." This section, a presumably innocent enactment of the legislature, has been used by police agencies, especially the New Castle County Police Department, as carte blanche for nearly any means to obtain consent to a chemical test, and as justification for decidedly robust police action: it furnishes a handy argument that where, there has been no refusal *after notice of the penalty of revocation for such refusal,* just about any ruse to secure a chemical test is within the protection of the statute.

The "reasonable steps" employed by police agencies have included advising a defendant that he must submit to a chemical test, that he is admitting his guilt if he refuses to submit, that if he does not submit, he will be incarcerated, that he will be released if he does agree to take the test, and that unless a breath test is agreed to, other officers will be summoned

to hold him down while the blood is drawn. In some rare instances, mouth pieces have been forced into the mouths of defendants whose breath has been extracted under external pressure applied by police officers. These outrageous and deliberately misleading practices have greatly increased convictions. Hardly anyone, especially the novice, is truly advised and informed that he does, in fact, have a right to refuse the test. Consequently, nearly everyone now submits to a chemical test. It should also be noted that under the new statute chemical tests are permitted before an arrest, which greatly reduces the police officer's burden; he no longer has to be as sure of probable cause to bring a subject to a police station for testing.

Another controversial section, §2742 (c), deals with administrative hearings. This provision is brand new. When a police officer makes a stop, he now obtains the suspect's driver's license, and, if it is a Delaware license, instead of getting his license back, the suspect receives a temporary license which expires in fifteen (15) days unless he asks for an administrative hearing before the Department of Motor Vehicles. At this hearing, which must be convened within thirty (30) days of the request, the arresting officer must establish by a preponderance of evidence that there was probable cause to believe that the suspect was in violation of §4177, and whether by a preponderance the person *was* in violation of §4177. For purposes of this section a blood alcohol concentration of .10 per cent is conclusive evidence of a violation. These informal hearings wallow in hearsay evidence: the arresting officer frequently appears unaccompanied by the operator of the intoxilyzer. Frequently, there is no one present who can be questioned about the proper administration of the test. Another disadvantage to the defendant is that, since there is no subpoena power for the administrative hearing, the defendant is powerless to command the presence of the State Chemist or the intoxilyzer operator on his own. While these hearings are, of course, supposed to be objective, hearing examiners enjoy the guidance of the attorney for the Department of Motor Vehicles, who, it just so happens, is a Deputy Attorney General. Since it is the Department of Justice which both prosecutes these cases and advises the "judge", it is unsurprising that defendants do not generally fare well.

Another disconcerting fact is that two of the three hearing examiners are retired State Policemen. Consider the case of a young man recently stopped at a road block. He registered .10 on the breath test, and appeared before one of these hearing examiners after being arrested by a Delaware State Trooper. Upon entering the hearing examiner's office, the State Trooper snapped to attention and saluted the hearing examiner, his former superior officer. As it turned out, the defendant was understandably and correctly concerned that he might not fare too well in such a situation, and though he ultimately prevailed at trial on the original driving under the influence charge, he lost his license for 90 days as a result of the adverse ruling at the administrative hearing.

If, as is frequently the case, a defendant is unsuccessful at the administrative hearing but successful at a trial on the criminal charge, he not only loses his driver's license for a minimum of 90 days, he must also under §2742 (h) enroll in a course of instruction or rehabilitation established under §4177 D at a cost of $75 and pay $125 license reinstatement fee. Thus one found not guilty of driving under the influence may very likely suffer a license loss and costs to the Division of Motor Vehicles of $200, and although he may appeal an adverse decision of the administrative hearing, it provides very little practical relief. Filing an appeal does not operate as a stay, and with the Superior Court schedule as crowded as it is, a defendant is unlikely to get his appeal heard before the expiration of the 90 days during which his license is revoked.

Other less dramatic changes deal with eligibility to elect entry into the first offenders' program. Under the new DUI Law, certain classes of defendants cannot avail themselves of the first offenders' program. For example, a defendant who has three or more moving violations within two years of the offense in question, or who was involved in an accident resulting in injury to any other person, or who was driving without a valid license or under suspension or revocation, or who had a blood alcohol reading of above .20 is no longer eligible to enter the program. This change allows even more capricious enforcement of the Statute as the Attorney General's Office *may* admit entry into the first offender's program by one who would not otherwise qualify. The license loss period during which one is not permitted a conditional license has been increased from 30 to 90 days. The minimum 60 day mandatory jail sentence for second offenders remains in effect.

However, there is still hope. The Courts are finally treating DUI cases as something more than minor traffic offenses. The Sixth Ciurcuit has recently ruled that Miranda rulings are applicable. *McCarty v. Herdman,* C.A. 6,33, Cr. L. 2498, 52 L.W. 2166. The Supreme Court of California has ruled that the breath ampule which captures the defendant's breath sample must be available to him for independent testing. *California v. Trombetta,* 142 Cal. Appeals 32, 138, _____ U.S. _____, 52 U.S. Law Week 3498, 3172 (Jan. 9, 1984). Both of these cases are presently before the United States Supreme Court. The Supreme Court of Colorado has ruled that the police cannot order roadside sobriety tests without probable cause. *People v. Carlson,* _____ Colorado Supreme, January 30, 1984. All of this brings us to what you should do if you are stopped by a police officer on suspicion of driving while under the influence. In a word, what you should do is *nothing.* Simply speaking to the officer gives him two pieces of evidence, the odor of alcohol and slurred speech. Furthermore, field coordination tests and chemical tests are often incriminating. Neither will be administered if you have a physical disability preventing you from performing field coordination tests or diabetes preventing the administration of the intoxilyzer. With this in mind, you should keep easily accessible in your vehicle a card which you can hold against the rolled up window of your locked vehicle as the officer approaches, proclaiming that you are a deaf-mute diabetic with a herniated disc, and, therefore, unable to perform any tests. This way, you will have preserved all of your rights and your chances of successfully defending your case will increase immeasurably. □

BOOK REVIEW

Alternatives: A Family Guide to Legal and Financial Planning for the Disabled

by L. Mark Russell
First Publications, Inc.
P.O. Box 1832,
Evanston, IL 60204
194 Pages,
Price: $9.95 plus $2.00 shipping

RICHARD C. KIGER

That the needs of the disabled are not confined to access to employment and public places is well illustrated by L. Mark Russell in this introduction to estate planning for families of the disabled. The subject does not necessarily come to mind when we discuss the disabled, but the author amply demonstrates the need for serious thought about it.

Russell's purpose is to explain estate planning from the viewpoint of a parent intent on making the best possible provision for a mentally ill or retarded child. Much of what he has to say, however, is also valuable to the parent of a child who is *physically* disabled. Someone in the enjoyment of full physical or mental health has different needs from those who are incapacitated. Proper estate planning can meet many of these needs, at least to some degree. This book also manages to suggest by discussing one easily identified group a need that exists in *every* family, the need for careful estate planning.

Russell not only cautions against do-it-yourself wills; he does something more valuable: he advises would-be testators that not every lawyer is both skilled in estate planning and well versed in laws pertaining to the handicapped. He then discusses in nontechnical language the basic principles of wills, guardianships, trusts, government benefits, taxes, insurance, and financial planning. Most lawyers will find the test basic, but unobjectionably so. More important, however, it explains in plain language principles well known to the Bar but of which the layman is frequently ignorant in planning for a disabled relative's future.

Several features enhance the value of the book to lawyers and laymen alike. A ten-page directory lists private organizations and government offices in the United States and Canada that provide services to the handicapped. It would be nice to have telephone numbers, too. A telephone number and address are given for the Special Education Information Referral Service, which apparently acts as clearinghouse for organizations serving the handicapped. Russell also includes a number of useful forms for creating an estate plan for the handicapped.

There are a few drawbacks: Russell may offend the lay reader in contending that sometimes the best thing a loving parent can do for a disabled child is to disinherit him. This may not be a startling proposition to the practitioner, but it could outrage anyone unable to read on and thereby learn the careful reasoning behind it. It would also be useful to have a fuller discussion of the problems that arise when property not subject to the control of the estate planner comes into the possession of a mentally disabled person. Finally, anyone unfamiliar with estate planning terminology would benefit if the glossary were expanded to include (and to decipher) the irritating acronyms that creep into estate planning shop talk. "DNI" and "QTIP" are familiar terms to most lawyers, but less accessible to the average layman than "RBI" or "MVP" or, for a few of us, "WPA" and "NRA."

In summary, the book is intended to acquaint non-lawyers with the basics of estate planning and to inform them that with effort and forethought, and the right lawyer, they can better provide for their loved ones. It succeeds admirably on this level. It is thought-provoking and informative reading for anyone with a relative in need of special care. □

Richard C. Kiger

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